CUK-H5327-69-LP2338

THE MADRAS LAW JOURNAL.

UNIVERSITY LIBRARY. LAW COLLEGE

EDITORIAL COMMITTEE:

MR. T. R. VENKATARAMA SASTRI, B.A., B.L., C.I.E.
RAO BAHADUR K. V. KRISHNASWAMI AIYAR, B.A., B.L.
MR. T. M. KRISHNASWAMI AIYAR, B.A., B.L.

ASSISTANT EDITORS:

MR. C. A. SESHAGIRI SASTRI, B.A., B.L.
„ S. PANCHAPAGESA SASTRI, B.A., M.L.

REPORTERS:

MR. R. C. CALBURN, BARRISTER-AT-LAW, *Privy Councu.*
„ B. V. VISWANATHA AIYAR, M.A., B.L., *High Court.*
„ S. V. VENUGOPALACHARI, B.A., B.L., „
„ K. CHANDRASEKHARA AIYAR, M.A., B.L., „

69

UNIVERSITY OF CALCUTTA NOT TO BE REMOVED DEPARTMENT OF LAW

[1939] I M. L. J.
January—June.

PUBLISHED BY
MR. R. NARAYANASWAMI IYER, B.A., B.L.,
Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
[*All Rights Reserved.*]
1939

CONTENTS.

ARTICLES.

	PAGE
Federal Court and Justiciable Disputes under the Government of India Act, 1935, by C. Unikanda Menon, Advocate, Egmore Lecture IV ..	3
The Golden Jubilee of the Madras Advocates' Association ..	43
The Golden Jubilee of the Madras Advocates' Association — Fifty years of Eventful Life: Address by Sir P. S. Sivaswami Aiyar, K.C.I.E. ..	89
The Indian Income-tax (Amendment) Act, 1939 by M. Subbaraya Aiyar, Advocate ..	63
Law and Letters: Address delivered by Sir C. P. Ramaswami Aiyar ..	135
Law and Religion: Address by The Hon'ble Mr. Justice S. Varadachariar ..	55, 121
Retirement of Justice Sir C. Madhavan Nair ..	1
Sir Srinivasa Varadachariar ..	45

SUMMARY OF ENGLISH CASES.

In re A Debtor. (1939) 1 Ch. 225 ..	102
Attorney-General *v.* Wilcox, (1938) 1 Ch. 934 ..	27
Bailey *v.* Howard, (1939) 1 K.B. 453 ..	153
Barnes *v.* Hely Hutchinson, (1939) 1 K.B. 93 ..	103
Bush *v.* Bush, (1939) P. 142 ..	155
Carpenter *v.* Ebblewhite and others, (1939) 1 K.B. 347 ..	150
Chisholm *v.* London Passenger Transport Board, (1939) 1 K.B. 426 ..	152
In re Cleadon Trust, Ltd., (1939) 1 Ch. 286 ..	149
Cohen *v.* Lester (J.) Ltd., (1939) 1 K.B. 504 ..	154
In re Curryer's Will Trusts: Wyly *v.* Curryer, (1938) 1 Ch. 952 ..	28
Dann *v.* Hamilton, (1939) 1 K.B. 509 ..	154
Greenwood *v.* Atherton, (1939) 1 K.B. 388 ..	151
Gibbs-Smith *v.* Gibbs-Smith, (1939) P. 170 ..	155
Groom *v.* Crocker, (1939) 1 K.B. 194 ..	105
Hanscombe *v.* Bedfordshire County Council, (1938) 1 Ch. 944 ..	27
Hibernian Bank, Ltd. *v.* Gysin and Hanson, (1939) 1 K.B. 483 ..	153

PAGE.

Inland Revenue Commissioners *v.* Kered, Ltd. and others, (1939) 1 K.B, 402 .. 152
Jackson *v.* Jackson otherwise Prudom, (1939) P. 172 .. 155
John *v.* Mendoza, (1939) 1 K.B. 141 .. 105
In re Kay's Settlement: Broadbent *v.* Macnab, (1939) 1 Ch. 329 .. 150
Kearry *v.* Pattinson, (1939) 1 K.B. 471 .. 153
Marquess of Zetland *v.* Driver, (1939) 1 Ch. 1 .. 99
Marthews *v.* Marthews, (1939) P. 97 .. 107
In re Maville Hose, Ltd., (1939) 1 Ch. 32 .. 101
McLaughlin *v.* Caledonia Stevedoring Company, Limited, (1938) A.C. 642 .. 25
Myers *v.* Rothfield, (1939) 1 K.B. 109 .. 104
In re Nilcholson's Settlement: Molony *v.* Nicholson, (1939) 1 Ch. 11 .. 100
Nokes *v.* Doncaster Amalgamated Collieries, Ltd., (1939) 1 K.B. 70. 103
The Nordborg, (1939) P. 121 .. 154
In re Oceanic Navigation Company, Ltd., (1939) 1 Ch. 41 ... 101
Owens *v.* Liverpool Corporation, (1939) 1 K.B. 394 .. 151
Pratt *v.* Pratt, (1939) P. 117 (C.A.): (1939) 1 All. E.R. 503 (C.A.). 108
Sammut *v.* Strickland, (1938) A.C. 678 .. 26
Shannon *v.* Lower Mainland Dairy Board, (1938) A.C. 708 .. 26
Sharpe *v.* Tophams, Ltd., (1939) 1 Ch. 373 .. 150
Sifton *v.* Sifton, (1938) A.C. 656 .. 25
Simons *v.* Simons, (1939) 1 K.B. 490 .. 154
Uxbridge Permanent Benefit Building Society *v.* Pickard, (1939) 1 K.B. 266 .. 107
Walton *v.* Walton, (1939) P. 104 .. 108

JOTTINGS AND CUTTINGS.

Agreement and Feeding of Jurors in Olden Times .. 158
An Upward Tendency .. 159
Bacon's Income .. 160
Baron Greer and others .. 114
Concerning Fees .. 158
Concerning Men of Straw and a Miss Tickle .. 115
Constitutions .. 111
Experiment in Punishment .. 163
If Winter Comes .. 30
Judge-made Law .. 37
Judicial Changes .. 30
Judicial Committee of the Privy Council: Preparation of the cases .. 162
Juries must be True .. 157

		PAGE.
Law Reporting	..	37
Law Reporting	..	134
The Lord Chancellor's Breakfast	...	29
Lord Eldon's Receipts	..	160
Lord Justice Green's Retirement	..	54
The Masters in Bad Odour	..	133
The Meaning of Words	...	29
Memorial to Lord Oxford and Asquith	..	113
More about Judicial Salaries	..	34
More Cat	..	112
Murray and His Retainer	..	161
The New King's Bench Judges	..	32
The New Lords Justices	..	31
A New Point in Tort	..	111
The New Puisnes	..	33
Our Young Judges	..	156
The Hon'ble Mr. Justice M. Patanjali Sastri	..	109
Present-Day Salaries	..	36
Pre-War Appointments	..	156
Provision for the other Judges	..	35
Reductions	..	35
Rules of Evidence	..	134
Sauce for the Gander	..	162
Separate Judgments	..	36
Sir Duncan Kerly, K.C.	..	34
Sir Thomas Hughes	..	38
The Hon'ble Mr, Justice B. Somayya	..	108
The Third Court of Appeal	..	32
Variations in Money Value	..	159
Westminster Hall	..	161
When Lord Reading Became S. G.	...	157
Without Lawyers	..	28
Yet a Little While	..	113

BOOK REVIEWS.

The Child Marriage Restraint Act, by Messrs. Tek Chand, M.A., B.C.L. (Oxon), Barrister-at-Law, Advocate, High Court, Lahore and H. L. Sarin, Advocate, High Court, Lahore. Published by The Eastern Law House, Calcutta. Price Rs. 2-8. 166

The Code of Criminal Procedure, by Mr. S. Ranganadha Aiyar, Advocate, Madras High Court (6th Edition). Price Rs. 20. Postage extra .. 163

PAGE.

Federation *versus* Freedom by B. R. Ambedkar, M.A., PH.D., D. SC., M.L.A., J.P., Barrister-at-law, Price Re. 1. Published by Messrs. R. K. Tatris, at Shree Laxmi Narayan Press, 364, Thakurdwar, Bombay, 2 .. 164

For Necessary Action—Speeches and Judgments of Sir Douglas Young, Edited by Shri Ram, B.A., LL.B., Advocate, High Court, Allahabad and V. M. Kulkarni, B.A., LL.B., Editor, Indian Cases, Lahore, Published by the Indian Cases, Ltd., Lahore .. 42

The Indian Income-tax Act (as amended by Act VII of 1939) by M. B. R. Jain (2nd Edition), 1939. Published by The Income-tax Law Publishing House, Delhi. Price Rs. 10 .. 166

The Law of Civil Appeal and Revision by K. N. Bhaumik, B.L. Published by Messrs. Eastern Law House Calcutta, 1939. Price Rs. 5 .. 167

The Law of the Indian Constitution by M. Ramaswamy, B.A., B.L. (with a Foreword by Professor, A. B. Keith) : Longmans, Green & Co., London, 21 sh. net) .. 119

The Law of Public Health in Madras Province by Mr. C. V. Naidu, Advocate, Madras High Court (1st Edition). Published by Rajeswari & Co., Tiruvallur (M. & S. M. Ry.). Price Rs. 5 net .. 165

The Law of Registration by K. J. Rustomji, Barrister-at-Law (3rd Edition), 1939. Published by Messrs. Butterworth & Co. (India) Limited. Price Rs. 10 .. 119

The Law relating to Places of Entertainment and Amusement. Published by K. Venkoba Rao, M.L., Advocate, 1/31, Nallathambi Mudali Street, Triplicane, Madras. 1938 Edition. Price Rs. 15 .. 39

Mayne's Hindu Law (10 Edition) by Mr. S. Srinivasa Aiyangar. Published by Messrs. Higginbotham & Co., Ltd., Mount Road, Madras. Price Rs. 21 .. 115

Medical Jurisprudence by M.A. Kamath, M.B. & C.M. (4th Edition), 1938. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 6 .. 42

The Negotiable Instruments Act, by Messrs. K. Bashyam and Adiga (7th Edition), 1939. Published by The Eastern Law House, Calcutta. Price Rs. 12-8-0 .. 118

The Provincial Insolvency Act, by Rameshwardial, B.A. (Hons.) LL.B., P.C.S., with a Foreword by The Hon'ble Mr. Justice J. H. Monroe, High Court, Lahore. Published by University Book Agency, Law Publishers, Kutchery Road, Lahore. (1st Edition). Price Rs. 9 .. 167

PAGE.

The Madras Public Health Act (Act III of 1939) by Mr. C. R. Krishna Rao, B.A., B.L., Advocate, Madras and Reporter, "All India Reporter". Published by V. S. N. Chari & Co., Madras. Price Rs. 2 .. 166

Speeches of Bhulabhai Desai. Published by G. A. Natesan & Co., Madras. 1938 Edition. Price Rs. 3-8-0. Foreign. *7s. 6d.* Postage Extra .. 40

Statute Law relating to Endowments by P. R. Ganapathi Aiyar, Advocate, Madras. Price Rs. 4 .. 41

UNIVERSITY LIBRARY LAW COLLEGE

NOTES OF INDIAN CASES.

PAGE.

Amirta Lal Ojha *v.* Uttam Lal Sarkar, I.L.R. (1938) 2 Cal. 559 .. 3
Bharat Abhyudoy Cotton Mills, Limited *v.* Maharaja of Dharbhanga, I.L.R. (1939) 1 Cal. 81 .. 19
Gangadhar Gopalrao Deshpande *v.* Shripad Annarao Deshpande, I.L.R. (1938) Bom. 655 (F.B.) .. 9
Gokal Chand-Jagan Nath (Firm) *v.* Nand Ram Das-Atma Ram (Firm), (1939) 1 M.L.J. 56=L.R. 66 I.A. 13=I.L.R. 1939 Lah. 56 (P.C.) .. 21
Gopal Sattu Tippe *v.* Dnyanu Maruti Khade, I.L.R. (1938) Bom. 649 .. 9
Hara Krishna Maiti *v.* Gajendra Nath Hatoi, I.L.R. (1938) 2 Cal. 643 .. 15
Jetha Lal Laxmi Chand Shah *v.* Amirta Lal Ojha, I.L.R. (1938) 2 Cal. 482 .. 1
Nirupama Debi *v.* Anath Bandhu Shaha, I.L.R. (1938) 2 Cal. 590.. 11
Radha Kissen *v.* Hira Lal Banjara, I.L.R. (1938) 2 Cal. 618 .. 13
The Secretary of State *v.* The Bank of India, Ltd., (1938) 2 M.L.J. 169=L.R. 65 I.A. 286=I.L.R. (1938) Bom. 502 (P.C.) [On appeal from I.L.R. (1937) Bom. 145] .. 6
Shankar Lal *v.* Rana Lal, I.L.R. (1938) All. 363 (F.B.) .. 5
Sheth Maneklal Kalidas *v.* Luvar Shivlal Dayaram, I.L.R. (1939) Bom. 9 .. 17

CASES CITED

IN

NOTES OF INDIAN CASES.

PAGE.

A

Atmaram Bhaskar *v.* Parashram Ballal (1920) I.L.R. 45 Bom. 954 .. 9

B

Bala Kushaba *v.* Abai Amirta Vaghmode, (1909) 11 Bom.L.R. 1093 .. 4
Basappa Budappa *v.* Bhimangowda Shiddangowda, (1927) I.L.R. 52 Bom. 208. 9
Bava Sahib *v.* Krishna Boyan A.I.R. 1936 Mad. 898 .. 12, 13
Bhagavatulla Krishna Rao *v.* Mungara Sanyasi, (1931) 62 M.L.J. 313=I.L.R. 55 Mad. 601 .. 3, 4
Bisvanath Maiti *v.* Baidyanath Mandul, (1885) I.L.R. 12 Cal. 199 .. 22

C

Chinnu Pillai *v.* Venkatasamy Chettiar, (1915) 30 M.L.J. 347=I.L.R. 40 Mad. 77 .. 15, 16
Cortis *v.* Kent Water-Works Company, (1827) 7 B. & C. 314=108 E.R. 741 .. 20

D

Devarajulu *v.* Mahamed Jaffer Saheb, (1911) I.L.R. 36 Mad. 53 .. 3
Dunichand Bishandas *v.* Comptoir National D'Escompte D'Paris A.I.R. 1930 Bom. 187 .. 5
Dwarkanath Chakravarti *v.* Atul Chandra Chakravarti, (1919) I.L.R. 46 Cal. 870 .. 18

G

Ganapathi Ranu *v.* Sewakram, (1918) 20 Bom.L.R. 461 .. 22
Ganeshi Lal *v.* Charan Singh, (1930) 59 M.L.J. 177=L.R. 57 I.A. 189=I.L.R. 52 All. 358 (P.C.) .. 12
Gopalji Kallianji *v.* Chhaganlal Vitthalji, (1920) I.L.R. 45 Bom. 1071 .. 2

H

Haranama *v.* Ghania Lal, A.I.R. 1930 Lah. 152 .. 22
Hem Chandra Chowdhry *v.* Kali Prosanna Bhaduri, (1903) L.R. 30 I.A. 177=I.L.R. 30 Cal. 1033 (P.C.) .. 17, 18
Hirst *v.* West Riding Union Banking Company, (1901) 2 K.B. 560 .. 20

I

Isri Prasad Singh v. Jagat Prasad Singh, (1937) I.L.R. 16 Pat. 557=A.I.R. 1937 Pat. 628 .. 12

J

Jnanendra Nath Singh Roy *v.* Shorashi Charan Mitra, (1922) I.L.R. 49 Cal. 626. 15, 17

K

Khudawand Karim *v.* Narendra Nath, (1935) I.L.R. 58 All. 548=A.I.R. 1936 All. 258 .. 12

PAGE.

Kishory Mohun Roy v Mahomed Mujaffar Hossein, (1890) I.L.R. 18 Cal. 188. 13
Knowles & Sons, Ltd. v. Bolton Corporation, (1900) 2 Q.B.D. 253 .. 2
Kunhi Kutti Ali v. Kunhammad, (1922) 44 M.L.J. 179 .. 18
Kunja Behari v. Mohit Singh, A.I.R. 1934 Pat. 531 .. 19

L

Lakshminarayana v. Hanumayya, A.I.R. 1937 Mad. 580 .. 9
Lord v. Lee, (1868) 3 Q. B. Cases. 404 .. 2

M

Sm. Mabia Khatun v, Sheikh Satkari, A.I.R. 1927 Cal. 309 .. 19
Malireddi Ayyareddi v. Gopalakrishnayya, (1920) 12 L.W. 101 .. 15
Malireddi Ayyareddi v. Gopalakrishnayya, (1923) 46 M.L.J. 164=L.R. 51 I.A. 140=I.L.R. 47 Mad. 190 (P.C.) .. 15
Maqbul Ahmad v. Pratap Narain Singh, (1935) 68 M.L.J, 665=L.R. 62 I.A. 80=I.L.R. 57 All. 242 (P.C.) .. 5
Mascarenhas v. Mercantile Bank of India, Ltd., (1931) 61 M.L.J. 837=L.R. 58 I.A. 433=I.L.R. 56 Bom. 1 (P.C.) .. 8
Matru Lal v. Durga Kunwar, (1920) 38 M.L.J. 419=L.R. 47 I.A. 71=I.L.R. 42 All. 364 (P.C.) .. 15
May v. Harcourt, (1884) 13 Q.B.D. 688 .. 2
Muhammad Abbas v. Muhammad Hamid, (1912) 9 A.L.J. 499 .. 12
Muthammal v. Razu Pillai, (1917) I.L.R. 41 Mad. 513 at 517 .. 16
Muthiah Bhagavathar v. Venkatrama Aiyar, (1935) 69 M.L.J. 303=I.L.R. 59 Mad. 121 .. 12
Muthuswami Pillai v. Arasayee Ammal, A.I.R. 1936 Mad. 901=44 L.W. 447 .. 12, 13
Mygapula Ganganna v. Sri Raja Uppalapati Venkata Vijaya Gopalaraju Garu Bafhiyat Bashand, (1916) 31 M.L.J. 870 .. 22

N

Nanda Lal Chatterjee v. Dwarka Nath Das, (1911) 16 C.W.N. 93=11 I.C, 892. 19
Nanibala Dassya v. Jaimini Sundari, A.I.R. 1923 Cal. 656 .. 19
Nareshchandra Mitra v. Molla Ataul Huq, (1929) I.L.R. 57 Cal. 1206 .. 13, 14
Natesan Chettiar v. Ramalinga Chettiar, (1937) 46 L.W. 332 .. 16
Nemichand Bhickachand Marwadi v. Kevalchand Jesraj Marwadi, A.I.R. 1924 Bom. 440=26 Bom.L.R. 380 .. 19

P

Panchanan Das v. Kunja Behari, (1917) 42 I.C. 259 .. 14
Parameshwari Din v. Ram Charan, (1937) 2 M.L.J. 359 at 361 (P.C.) .. 9
Patto Kumari v. Upendra Nath Ghosh, (1919) 4 P.L.J. 265 .. 2
The Pharmaceutical Society v. The London and Provincial Supply Association, Limited, (1880) 5 A.C. 857 at 862 .. 20
Pichai Konar v. Narasimha Rama Aiyar, (1929) 58 M.L.J. 343 .. 15

R

Raja Har Narain Singh v. Chandarain Bhagwant Kuar, (1891) L.R. 18 I.A. 55=I.L.R. 13 All. 300 (P.C.) .. 1
Raja Wazir Narain Singh v. Bhikhari Ram, (1922) I.L.R. 2 Pat. 207 .. 13
Ramabhadrachar v. Srinivasa Aiyangar, (1900) I.L.R. 24 Mad. 85 .. 11, 12
Ramachandra Naidu v. Pavalayammal, (1934) 68 M.L.J. 717 .. 15, 17
Ram Chandra Chatterjee v. Pramatha Nath Chatterjee, (1921) 35 C.L.J. 146=A.I.R. 1922 Cal. 237 .. 3, 4
Ram Charan v. Parameshwari, (1932) I.L.R. 55 All. 235 .. 9

PAGE.

Ram Charan Sahu v. Mata Prasad, (1927) I.L.R. 49 All. 565 .. 18
Ramji Lal v. Roshan Singh, A.I.R. 1935 All. 692 .. 17
Russell v. Palmer, (1767) 2 Wils. K. B. 325=95 E.R. 837 .. 21

S

Sakharlal Jamnadas v. Jerbai Sorabji, (1934) I.L R. 58 Bom. 564 .. 13, 14
Sambayya v. Pedda Subbayya, (1937) 2 M.L.J. 703 .. 5
Saravana Pillai v Sesha Reddi, (1908) 18 M.L.J. 34=I.L.R. 31 Mad 469 (F.B.). 22
Sharan Singh v. Mt. Man Kuar, A.I.R. 1929 Lah. 746 .. 19
Sharoda Moyee Burmonee v. Wooma Moyee Burmonee, (1867) 8 W.R. 9 .. 13
Sheffield Corporation v. Barclay, (1905) A.C. 392 .. 7
Sheodhyan v. Bholanath, (1899) I.L.R. 21 All. 311 .. 13
Shib Krishna Dawn & Co. v. Satish Chunder Dutt, (1911) I.L.R. 38 Cal. 522 .. 2
Shivji Poonja Kothari v. Ramjimal Babulal, (1930) 55 Bom. 452 .. 2
Shri Sharada Peeth Math v. Shri Rajarajeswarashram, A.I.R. 1933 Bom. 276=35 Bom.L.R. 440 .. 18
Sitarama Sastrulu v. Suryanarayana Sastrulu, (1898) 8 M L J. 183=I.L.R. 22 Mad. 12 .. 22
Sorabji Coovarji v. Kala Raghunath, (1911) I.L.R. 36 Bom. 156 .. 14
Sri Lal v. Arjun Das, (1914) 18 C.W.N. 1325 .. 2
Sri Ranganatha Thathachariar v. Veeravalli Rajagopalachariar, A.I.R. 1928 Mad. 16 .. 22
Subramania Aiyar v. Krishna Aiyar, (1925) 51 M.L.J. 172 .. 13
Suraj Ranjan Choudhry v. Premchand Choudhry, (1917) 22 C.W.N. 263 .. 18
Swaminathan v. Official Receiver of Ramnad, (1937) 1 M.L.J. 727=I.L.R. 1937 Mad. 784 (F.B.) .. 21

T

Tejpal Jamunadas v. B. Nathmull Company, (1919) I.L.R. 46 Cal. 1059 .. 2
Tirumala Narasimhacharyulu v. Sobhnadri Appa Rao, (1932) 140 I.C. 270 at 272 .. 18

U

Umes Chunder Sircar v. Zahur Fatima, (1890) L.R. 17 I.A. 201=I.L.R. 18 Cal. 164 (P.C.) .. 15

V

Vayyaprath Kunnath Valia Muhammad v. Chowkkaran Orakkatteri Savakutti Koyi, (1933) 66 M.L.J 355 .. 4
Venkatanarasayya v. Achamma, (1881) I.L.R. 3 Mad. 3 .. 19

NOTES OF RECENT CASES.

	PAGE.
MADRAS AGRICULTURISTS RELIEF ACT (IV OF 1938), S. 4 (*d*)—Two separate plots included in a mortgage—One of them with building in it—The other being a vacant site at the time of mortgage—House constructed later on—If it is house property—Mortgage debt—If comes within the operation of the Act ..	28
——S. 19—Application under—Proper Court to entertain ..	6
——Ss. 19 AND 20—Application for stay of execution under S. 20 by the father and manager of joint family—Application under S. 19 not filed—Subsequent applications under Ss. 19 and 20 by his minor son represented by his mother —Maintainability of ..	35
ASSOCIATION—Meeting—Notice given of a resolution—Amendment moved at the meeting—Want of notice in respect of—Amended resolution passed at the meeting—Interference by Court	11
CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929) AND CRIMINAL PROCEDURE CODE, S. 188—Proviso—Offence under the Child Marriage Restraint Act committed in French territory—Inquiry into charge—Essentials for ...	33
CIVIL PROCEDURE CODE (V OF 1908), S. 11—Bar of *res judicata*—Two suits tried together—Major suit including the subject matter of the minor suit—Common judgment—Appeal preferred against the decree in the major suit but not against the other decree. ...	40
——S. 11, EXPL. IV—Might and ought—Different grounds of attack—Both suits for ownership of same properties—First suit as members of joint family—Second suit as reversioners—If maintainable—Litigating under the same title ..	32
——S. 47 AND O. 21, R. 95—Bar of suit—Mortgagee purchasing properties in pursuance of mortgage decree—Defendant purchasing those properties in execution of another decree subject to mortgage subsequent to mortgage suit—Application against defendant to remove obstruction—Dismissal of, on ground of limitation—Suit against defendant for possession—Proper procedure	22
——S. 73—Decree for sale on mortgage—If a decree for payment of money ..	16
——S. 132—Persons exempt from appearance in public—Nature of exemption —Appearance before Judge in a place chosen by him ..	40
——O. 9, R. 9 AND S. 141—Pauper petition—Dismissal for default—Petition under O. 9, r. 9 and S. 141—Duty of Court ..	25
——O. 18, R. 18—Local Inspection made by Judge—Judgment based solely on the impression formed at the time of—No record made as to what was found at that time—Propriety of procedure ..	37
——O. 21, RR. 11 AND 17—Execution petition—Decree-holder or person duly authorised not signing it—Evidence to show that the person signing was an authorised agent—Admission of petition as being in proper form—Rejection at later stage for not being verified by an authorised agent—Proper procedure ..	25

PAGE.

CIVIL PROCEDURE CODE (V OF 1908), O. 38, R. 5—Application under—Conversion of an execution petition into—Propriety—No existence of personal decree—Dismissal of execution petition .. 32

——O. 39, R. 1 (a)—Application by defendant—Competency .. 15

——O. 40, R. 1—Partition suit—Appointment of receiver—Sale by direction of Court—Proper notice to be given by receiver .. 21

——O. 45, R. 4—Scope—Two different suits tried together—A common question existing for them—Permission for consolidating the suits—If can be granted .. 17

——O. 47, R. 1—Error apparent on face of record—Case wrongly dismissed for default—Application for review—Maintainability .. 11

COMPANIES ACT (VII OF 1913), Ss. 28 (2) AND 30 (1)—Person subscribing for shares in the memorandum of association—No allotment of shares—Liability for value of shares .. 15

CO-OWNER—Purchaser at auction of unspecified share—Suit against other co-owners for partition and possession—Mesne profits during period of exclusion—If can be awarded—Nature of relief to be granted .. 23

COURT-FEES ACT (VII OF 1870), S. 7 (IV-A) AND (V)—Suit for cancellation of a deed and possession—Court-fee payable—Proper mode of valuation .. 24

——S. 7 (V) AND SCH. II, ART. 17-B—Prior mortgagee becomes purchaser of portion of property—Subsequent mortgagee becoming purchaser of the entire property subject to the early mortgage—Prior mortgagee obtaining symbolical possession—Suit for partition against subsequent mortgagee remaining in actual possession—Proper court-fees .. 16

——S. 7 (V) AND SCH. II, ART. 17-B—Suit to recover possession of the office of the managership in regard to a school—No relief asked for recovery of the possession of the school building and its endowments—Proper court-fee—Value for purposes of jurisdiction—Suits Valuation Act (VII of 1887), S. 4 .. 36

——SCH. II, ART. 11—Preliminary decree passed in partition suit—Question of future mesne profits left open—Final decree passed and possession of properties taken by plaintiffs—Application under O. 20, r. 12 to enquire into future mesne profits—Rejection of—Appeal against order refusing to hold such enquiry—Court-fee payable—Order of rejection if amounts to a decree .. 34

(MADRAS) DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 12, 49 AND 51—Disqualification of a person under S. 49 (2) (c)—Election as Councillor and Chairman—Petition to set aside election as Chairman—Declaration of the other candidate as Chairman—Validity of—Proper procedure .. 5

——Ss. 68 AND 69—Auction by committee of Municipality—Defendant making the highest bid—Agreement signed by Chairman and others—Municipality sanctioning the agreement subsequently—Validity of agreement—Removal of rubbish by defendant in pursuance of agreement—If Municipality is entitled to relief—Contract Act, S. 65—Applicability .. 37

MADRAS ESTATES LAND ACT (I OF 1908), S. 3 (ii)—Suit for rent under S. 77—Land occupied by houses though alleged by the landholder to be ryoti—No proof of payment of rent—Burden of proof .. 21

——S. 20-A—Application under—Doctrine of *res judicata*—Applicability of .. 25

——S. 205—Revision by District Collector—Order wrong on merits—Interference by High Court under S. 115, Civil Procedure Code .. 20

PAGE.

EVIDENCE ACT (I OF 1872),—Suit by presumptive reversioner to declare a sale by widow as not binding on reversion—Statement by plaintiff reversioner in a prior suit as legatee—If admissible in this later suit as reversioner—Statement in prior suit by widow's mother-in-law—Admissible under S. 32, cl. (5) of the Evidence Act .. 1

——Ss. 24, 25 AND 26—Applicability—Inquiry on complaint—Admission of liability before police officer—Admissibility .. 7

——S. 30—Co-accused—Confession at preliminary enquiry—Admissibility against the other co-accused .. 27

——S. 157—Deed not *inter partes*—Recital of boundary in—Executant of document examined as a witness—Admissibility of the recital .. 7

EXECUTION—Execution proceedings—Permission of Court to sell property privately—Sale in pursuance of—Sale proceeds not deposited within stipulated time but deposited later on—Sale set aside—Amount deposited and drawn out by the decree-holder—Necessity to refund before execution .. 19

EXECUTION PETITION—Judgment-debtor's wife filing claim petition under O. 21, r. 57—Dismissal of execution petition—Legal representative of judgment-debtor filing fresh application—Fresh claim petition by judgment-debtor's wife successful—Petition whether barred .. 41

EXPLOSIVES ACT (IV OF 1884), S. 4—Construction—'Explosive'—If includes electric-sparklets .. 1

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), Ss. 13 AND 21—Plaintiff appointed as village headman by Revenue Divisional Officer and Collector—Board of Revenue appointing another—Plaintiff in possession of the office—Suit for declaration and injunction—Jurisdiction of Civil Court—Regulation I of 1803, S. 5—Power of superintendence of the Board of Revenue under—Nature of .. 26

HINDU LAW—Adoption—Consent of sapinda—Consent obtained on condition that his share in the joint family should not be affected by the adoption—If valid—Consenting sapinda, if can question validity of his consent .. 5

——Adoption of daughter's son—Dispensing with datta homam—Whether texts permit .. 41

——Debts—Member of agriculturist family engaging in trade—Possibility of loss—Debts incurred if *avyavaharika* .. 23

——Husband and wife—Denial of marriage by husband—If legal cruelty—If wife entitled to separate maintenance .. 36

——Impartible estate—Illegitimate son of previous zamindar—If entitled to maintenance under Hindu Law .. 39

——Joint family—Separate property—Dispute as to—Onus of proof .. 19

——Maintenance—Husband dying leaving a will—Will providing for a particular rate of maintenance—Court, if can interfere with such provision as inadequate—Widow living apart for no justifiable cause—No improper reason for her living apart—If she forfeits her right to future maintenance—Maintenance, if can be enforced against a legatee from her husband .. 4

——Succession—Sons of unmarried woman—Father unknown—If descendants of the son "sagothra sapindas" .. 43

——Trade started by father in a non-trading family—Debts incurred for such trade—If not binding on the sons .. 4

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), S. 65-A (5) (*b*)—Appeal under, fully heard—Adjournment for passing final orders to a certain

PAGE.

date—President alone adjourning the case to a prior date "for orders"—Appellant not given notice of this date—Judgment delivered by Full Board—Members of the Board not sitting together when passing orders—Validity of judgment .. 13

INAM—Suit by Zamindar against inamdar and his tenants for water taken for second crop from his tank—Liability of inamdar—Nature of—Jurisdiction of Revenue-Court—Madras Estates Land Act, S. 70—Claim of zamindar against inamdar if one against a ryot .. 29

INDIAN CONTRACT ACT (IX OF 1872), S. 30—Pronote for losses incurred in gambling—If enforceable .. 44

INSOLVENCY—Suit on a mortgage by the mortgagee—Final decree for sale—Subsequent adjudication of mortgagor as an insolvent—Official Receiver not made party in execution—Execution sale and purchase by a stranger in good faith—Subsequent sale of the same property by the Official Receiver—Purchaser from the Official Receiver gets title to the equity of redemption—Civil Procedure Code (V of 1908), O. 21, r. 22—Provincial Insolvency Act (V of 1920), S. 51 .. 6

INSURANCE POLICY—Assignment of—Endorsement, if an absolute present transfer—Validity of transfer—Decree against assets of assured—If policy amount assets of deceased—Bonus reserved to be paid to assured—Assets—Transfer of Property Act, S 130—Absolute transfer—What is .. 3

LIMITATION ACT (IX OF 1908)—Partnership—Acknowledgment made by one partner—If sufficient acknowledgment .. 8

——S. 6 (3) AND ART. 144—Sale of minor's property by Court guardian—Death of minor—Suit for possession by legal representative within three years from—Adverse possession of defendant for more than twelve years—Effect .. 20

——ARTS. 62, 120, 123 AND 144—Suit by heir on death of prior legatee for partition—Property in the hands of tenant for true owner—Limitation for rent .. 12

——ARTS. 120 AND 131—Applicability—Remuneration attached to office—Suit against Government to establish right to office—Nature of—Commencement of limitation .. 17

MADRAS LOCAL BOARDS ACT (XIV of 1920), S. 55 (2) (c)—Completion of work undertaken—Money claim against a person under a security agreement—If amounts to subsisting contract .. 8

——S. 79, CL. 3—Zamindari villages—Quarries, fisheries and pasture—Levy of local cess in respect of income—Principle of double assessment .. 9

MALABAR LAW—Acquisition of properties in names of sisters out of brother's funds—If joint tenancy or tenancy-in-common created—Inference of benami as regards beneficial interest in property and share in it .. 14

MADRAS MARUMAKKATAYAM ACT (XXII of 1933), S. 5 (2)—Marriage between a Brahmin and a Nair lady—Validity of—Benefit under the Act—If can be renounced by declaration .. 15

——SS. 41 AND 43—Construction—'Tarwad' in S. 43 (1)—Registration of main tarwad as impartible—Tavazhi of the tarwad possessing separate properties—Applicability of Chapter VI—Suit for partition of those properties—Maintainability .. 38

MESNE PROFITS—Hindu Law—Widow—Alienation by—Death of widow—Suit for possession by reversioner questioning the alienation—Alienation found invalid—Conditional decree for possession on payment of binding portion of

PAGE.

debt—If plaintiff entitled to mesne profits from widow's death or only from date of payment .. 2

MOTOR VEHICLES RULES OF 1928, RR. 175 AND 176—Driver of bus—Liability for overloading .. 18

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), Ss. 9, 30 AND 93—Hundi—Endorsement by payee—Transfer of debt by a later undertaking given to bear the loss resulting from transfer—Suit by transferee against drawer of hundi—If hundi was taken with notice of dishonour—Liability of drawer's son .. 39

———S. 118—Evidence Act, S. 114—Execution of promissory note—Presumption as to consideration—Plaintiff suing on the note—Proof as to her inability to advance the amount recited in the note—Duty of the Court to examine transaction and ascertain the true consideration .. 29

PARTNERSHIP ACT (IX OF 1932), Ss. 69 (2) AND 74—Conflict between—Suit by firm against defendant for a sum of money—Registration of firm during pendency of suit—Plaintiff if entitled to decree .. 35

PENAL CODE (XLV OF 1860), S. 302—Murder—Recommendation for reduction of sentence under R. 260 of the Criminal Rules of Practice—Sentence of death—If appropriate .. 28

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 28—Superstructure which can be removed by tenant—If movable property—Suit to set aside claim order in proceeding arising in execution of a Small Cause Court decree—Cognisability by City Civil Court—Madras City Civil Courts Act, S. 5—Scope .. 13

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 4—Application under—Prior decision of Civil Court on some matter—Effect—*Res judicata* .. 43

———S. 28 (2)—Joint Hindu family—Insolvency of father—Attachment of son's shares before the sale thereof by Official Receiver—Power of Official Receiver—Leave of Insolvency Court—If necessary for valid attachment .. 23

———S. 44 (1) (*c*)—Applicability—Forbearance to claim rights in insolvency—Fraud of insolvent—Nature of .. 26

SPECIFIC PERFORMANCE—Contract to sell—Failure of vendee to pay—A term lease by vendor to raise money for filing suit for specific performance—If itself a bar to suit—Readiness of vendor to perform—Meaning of—Alternative claim for damages—If sustainable .. 10

SPECIFIC RELIEF ACT (I OF 1877), S. 42, PROVISO—Suit for declaration of title only as regards certain jewels—Jewels in the possession of Court—No prayer for consequential relief asked for—Suit if maintainable .. 33

SUCCESSION ACT (XXXIX OF 1925), S, 304—Certain creditors of deceased intermeddling with his estate—Distribution of assets by them among creditors—Right of creditor not receiving payment in that distribution—Liability of creditors to refund—Extent of .. 31

MADRAS SUPPRESSION OF IMMORAL TRAFFIC ACT (V OF 1930), S. 5 (1)—Conviction of inmate of brothel—Legality of .. 33

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 41 AND 115—Gift by husband to wife of certain property—Sale of the same property by him to plaintiff—Plaintiff alleging that vendor's wife took prominent part in the negotiations preceding the sale—Suit by plaintiff for declaration and injunction—Wife if barred from setting up her title to the property—Nature of estoppel under Ss. 41 and 115 .. 30

THE MADRAS LAW JOURNAL.

I] FEBRUARY [1939

THE GOLDEN JUBILEE OF THE MADRAS ADVOCATES' ASSOCIATION.

The Golden Jubilee of the Madras Advocates' Association was celebrated on the 19th February, 1939, on the completion of fifty years of eventful life. It was quite appropriate that one of the surviving foundation members of the Association, Sir P. S. Sivaswami Aiyar, K.C.I.E., a distinguished lawyer and an ornament to the cultured society of Madras, should have been chosen to preside over the public meeting, held in the spacious grounds of the Beasant Scout Camping Centre, Adyar, and bring to a happy close a whole-day programme of festivities and entertainments. We share with the President of the Association the feeling of pride in the 'uninterrupted prosperity' and the 'almost unexampled' record of the Association in the history of professional associations in India.

We can never forget the prodigious labours of the early pioneers, who were responsible for the building up of a high legal tradition and of so useful an institution as the Madras Advocates' Association, started in the eighties of the last century. The shining example of these great pioneers will, we hope, be always guiding the present generation of lawyers (and members of the Madras Advocates' Association) as well as those yet to come. Numerous were the messages of good wishes received from distinguished persons and bodies for the Golden Jubilee and we heartily share in the rejoicings as well as in the offer of felicitations to the Madras Advocates' Association.

THE
MADRAS LAW JOURNAL.

I] FEBRUARY [1939

FEDERAL COURT AND JUSTICIABLE DISPUTES UNDER THE GOVERNMENT OF INDIA ACT, 1935.*

BY

C. UNIKANDA MENON, *Advocate, Egmore.*

I. External affairs and the Implementing of Treaties and Agreements.

These words suggest the intention of the Imperial Government to grant to the Federal Government the right to enter into treaties and dealing in a way with political and external affairs arising between the Federated India and any other part of the empire or through His Majesty's representative with any foreign power. In the League of Nations adumbrated by the Peace Conference in 1919, India has become a prominent member of the league. And if treaties and agreements were to be entered into amongst the various nations to adopt a particular line of policy, it will become incumbent on the Indian Federation to enact laws in fulfilment of those treaties and agreements. As an illustration of Acts in fulfilment of treaty obligations may be taken The Italian Loans and Credit Prohibition Act I of 1936 passed by the Indian Legislature on 21st April, 1936, prohibiting from giving loans, etc., to Italy. The preamble is, whereas it is expedient in pursuance of the obligations imposed upon India as a signatory to the covenant of the League of Nations by Art. 16 thereof to prohibit the making of certain loans and credit, it is hereby enacted as follows:—

S. 2 says that:

> "No person shall make or contribute to or participate in or assist in making or issuing any loan to or for the benefit of the Government of any Italian territory."

*Lecture IV.

It might be added that this Act was repealed immediately the late Abyssinian war came to an end. But if those laws cover a subject within the Federal list, the Federal legislation is valid and *intra vires*. But supposing the line of policy requires an enactment on a provincial subject then the legislation may ordinarily be *ultra vires* and invalid. An interesting case illustrating a similar position arose in Canada which went up to the Privy Council, *Attorney-General of Canada* v. *A. G. of Ontario and others*, (1937) A.C. 326. The Dominion Parliament of Canada, to give effect to the draft convention adopted by the International labour organisation of the League of Nations in accordance with the labour part of the Treaty of Versailles, 1919 and ratified by the Dominion, passed the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935 and the Limitation of Hours of Work Act, 1933. The Acts were challenged by the province of Ontario as *ultra vires* of the Parliament of Canada and invalid in that the legislation related to matters coming within the class of subjects "property and civil rights in the province" which was an exclusively provincial subject. The Privy Council remarked that:

> "No further legislative competence was obtained by the Dominion from its accession to international status and the consequent increase in the scope of its executive functions. There was no existing constitutional ground for stretching the competence of the Dominion Parliament so that it became enlarged to keep pace with enlarged functions of the Dominion executive If the new functions affected the classes of subjects enumerated in S 92, legislation to support the new functions was within the competence of the provincial legislatures only; if they did not, the competence of the Dominion Legislature was declared by S. 91 and existed *ab origine*. The Dominion could not, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."

But if such a legislation were enacted in India by the Federal Legislature, in accordance with such treaty, it would be *intra vires*, as the legislation would fall under "Regulation of Labour" in the Federal list. But take a case in which the Federal legislature in implementing its international treaty obligations has to cover a subject which is not within the Federal list. Then what is to happen? S. 106 of the Government of India Act of 1935, gives the answer.

It says that from the fact that in the Federal list mere reference is made to the power of the Federal legislature to enact laws for implementing international treaties, it does not follow that the Federal legislature has got power to enact them.

without obtaining the previous sanction of the Governor or the ruler of the province or the state as the case may be. But if the Federal list contains the subject in respect of which a law is made by way of implementing treaties, then it will be binding on the whole Federation including the provinces and the states.

An interesting case come before the Supreme Court of the United States in *Missouri* v. *Holland*, 252 U. S. 416. For the protection of migratory birds, a treaty was entered into between the United States of America, and Great Britain. The treaty recited that many species of birds in their annual migration traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of protection. It therefore provided specified closed seasons and protection in other forms and agreed that the two powers would make necessary laws for carrying out the treaty. The United States passed an Act in pursuance of the treaty and prohibited killing, capturing or selling any of the migratory birds. The state of Missouri brought a suit against the game warden of the United States from enforcing the Migratory Bird Treaty Act on the ground of its unconstitutional interference with the sovereign right of the state and on the ground that the state is entitled to migratory birds found in it. Mr. Justice Holmes held that the statute is valid and observed:

"The state founds its claim on exclusive authority upon an assertion of title to migratory birds. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of such birds but it does not follow that its authority is exclusive of paramount power . . . Wild birds are not in the possession of any one and possession is the beginning of ownership. The whole foundation of states-rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state and in a week a thousand miles away . . . Valid treaties are binding within the territorial limits of states, as are elsewhere throughout the Dominion of the United States."

(*Baldwin* v. *Frank*, 120 U. S. 678, 685.)

"Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the state and has no permanent habitat therein. But for the treaty and the statute there might be no birds for any power to deal with. We see nothing in the constitution that compels the government to sit by while a good food supply is cut off and the protectors of our forests and our crops are destroyed. The reliance is vain and were it otherwise the question is whether the United States is for-

bidden to act. We are of opinion that the treaty and the statute must be upheld."

But if such a treaty were to be entered into by the Federal Government of India, it could not legislate without the previous sanction of the Governor of the province or the Ruler of the state under S. 106 of the Act, as migratory birds are wild birds and 'wild birds' are in the Provincial list.

Sometimes difficult questions might arise as to the real scope and ambit of such international treaty or agreement, such as whether an Act passed by a province contravenes that international treaty or agreement. Such a case arose in the Supreme Court of the United States in *Heim* v. *McCall*, 239 U.S. 175, where the question was whether the equality of rights and privileges with citizens of the United States with respect to the security for persons and property, which the citizens of Italy are assured by the Italian treaty of February 26, 1871, is not infringed by the Labour Law of New York, N.Y. Consol Laws, Ch. 31, S.14, which stated that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality and that in such employment citizens of New York must be given preference. The relevant provisions of the treaty of 1871 said:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other most constant protection and security for their persons and property, etc. Construing the provisions of the treaty, the court of appeals decided that it does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys. The treaty with Italy was considered in *Patsone* v. *Pennsylvania*, 232 U.S. 138, where it was held that a law of Pennsylvania making it unlawful for unnaturalised foreign born residents to kill game, and to that end making the possession of short-guns and rifles unlawful did not violate the treaty. Adopting the declaration of the court below, it was held that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property."

II. Taxing Power—its Distribution

The principle of distribution of taxing power between the Federal and the Provincial legislatures, unlike the one on the basis of the direct or indirect legislation as in the Dominion of Canada and the Commonwealth of Australia, is based on the principle that matters relating to the whole of Federated India are made federal subjects and matters relating to a constituent part thereof are made provincial subjects. For instance import and export duties on the customs frontiers, duties on customs,

excise duties on tobacco and other goods manufactured in India except alcoholic liquors, opium, Indian hemp and other narcotic drugs or any toilet or medicinal preparations containing them, taxes on non-agricultural income, succession duties on non-agricultural land, taxes on corporations and on the capital value of assets, terminal taxes on goods carried by rail or air—are all subjects for federal legislation. Whereas, taxes on alcoholic liquors aud opium and Indian hemp and other narcotics medicinal and toilet preparations containing them, taxes on agricultural lands, capitation tax and professional tax and taxes on business, taxes on animals and boats and on sale of goods and on advertisements, cesses on the entry of goods into local area for use therein and taxes on mineral rights, not covered by an Act of the Federal legislature relating to mineral rights are all subjects for provincial legislation.

III. The Federal Powers of Taxation—(a) Taxes defined

Taxes have been defined to be "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes". Cooley, Constitutional Limitations, 7th Edn., p. 678. They

> "differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by the authority of law, and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of Government." (Cooley on Taxation, Chap. I.)

The levying and collection of taxes amounts to the taking of private property for a public use, but the taxing power is distinct from that of what is known in the United States as Eminent Domain.

The Extent of the Taxing Power

In *McCulloch* v. *Maryland*, 4 Wheat. 316, Marshall, C. J., says:

> "The power of taxing the people is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax, the legislature acts upon its constituents. This is in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard themselves against its abuse."

The power to tax, Marshall, C.J., concludes, "involves the power to destroy". In *Veasie Bank* v. *Fenno,* 8 Wall. 533, it was contended before the Supreme Court that the tax was so excessive as to destroy the franchise of the bank and was therefore beyond the constitutional power of Congress. The court held that

> "the answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

Tax, Duty, Imports, Excise compared

Under S. 311 (cl. 1) of the Government of India Act of 1935, taxation includes the imposition of any tax or import whether general or local or special, and tax shall be construed accordingly. The terms 'Duty' and 'Import' have at times a meaning broad enough to make them practically synonymous with the general term 'tax', but, used in a more specific sense, they refer to customs or customs dues levied upon goods imported from foreign countries.

An excise is an internal tax levied upon manufacture, sale or use of a thing and is thus often termed a consumption tax. *Sec* In the matter of the *Central Provinces and Berar Sales of Motor Sprit and Lubricants Taxation Act, 1938 (XIV of 1938),* (1939) 1 M.L.J. Supplement at p. 31. In the United States an excise has come to mean practically all taxes other than ustoms dues or duties . . . . Thus, excise taxes are, in general, known as internal revenue duties and as a rule their imposition is provided for in what are known as "Internal Revenue Act", as distinguished from "Tariff Acts" which fix the customs duties to be imposed upon imports from foreign countries. See Willoughby on the Constitution of the United States, Vol. II, S. 392.

III. (b) **Exemption from Taxation**

Ss. 154 and 155 of the Government of India Act of 1935 exempt certain propeity from federal or provincial taxation. S. 154 exempts from all federal or provincial taxes all property vested in His Majesty for purposes of the Federation. But if that property is liable to be taxed under any law before the Federation comes into existence, it may be exempted from such taxes by any federal law: otherwise the liability will continue so long as that tax continues. S. 155 exempts from federal

taxation the Government of a Province or a Ruler of a federated state in respect of lands or buildings situated in British India or any income accruing, arising or received in British India. But if any trade is carried on by or on behalf of the Government of a Province in any other part of British India, or by a Ruler in any part of British India, he is not exempted: nor is he exempted in respect of lands or buildings being his personal property; nor in respect of income being his personal income. But this will not affect the exemption enjoyed by a Ruler at the time of the passing of the Government of India Act in respect of any Indian Government securities issued before that date. But the federal legislature has power to tax such property, lands or buildings which His Majesty's Governor or the Ruler of a federated state has really conferred upon a subject but not where no estate or interest has been so conferred. *See* Canada's Federal System by A.H. Lefroy Edn. (1913), p. 415.

III. (c) Provincial Taxing Federal

The Federal Legislature under its power to tax non-agricultural income have power to tax the salaries . f Provincial officers, working in the Provinces. Have the Provincial Government the right to tax the salaries of Federal officers, working in the Provinces? The Government of India Act of 1935 does not permit the Provinces to levy an income-tax on non-agricultural income. But it can levy a professional tax on the federal officers. In a case from Australia in *Webb* v. *Outrim*, (1907) A.C. 81, the Privy Council held that an officer of the Australian Commonwealth resident in Victoria, and receiving his salary in that State, is liable to be taxed in respect thereof for income-taxes imposed by an act of the Victorian Legislature. Their Lordships held that there being no express provision in the Commonwealth Act restricting the Victorian Legislature from imposing such a tax, the income-tax is valid.

A question might arise whether under the Government of India Act of 1935, a Province might tax a corporation created by the Federal Legislature. No doubt the Federal Legislature can impose a tax on such corporations. But supposing the Provincial legislature imposes a tax on a federal corporation carrying on its business in the province, would it be valid? It is submitted that there is nothing to show that it has got such a power, except it be that the Provincial Legislature enact the

UNIVERSITY OF CALCUTTA ★ DEPARTMENT OF LAW ★ NOT TO BE REMOVED

laws under the subject of "Taxes on professions, trades, callings or employments" under the Provincial list in Schedule VII.

In the well-known case of *McCulloch* v. *The State of Maryland,* 4 Wheat, 316, the Supreme Court of the United States denied the right of the Provincial Legislature to tax a federal corporation. The Congress incorporated the Bank of the United States which established a branch in Baltimore. The Legislature of Maryland passed an Act to impose a tax on all the banks or branches thereof, in the state of Maryland, not chartered by the Legislature. McCulloch, the cashier of the branch at Baltimore, having issued notes upon the unstamped paper in violation of this Act, the suit was brought against him. In the course of the argument, the power of the state to tax such a bank was called in question. The Chief Justice Marshall while holding that the tax is unconstitutional observed as follows:—

"It has also been insisted that as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the General Government and have conferred upon it the general power of taxation. The people of all the states and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents: and these taxes must be uniform But when a state taxes the operations of the Government of the United States, it acts upon institutions created not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is between the action of the whole on a part, and the action of a part on the whole, between the laws of a Government declared to be supreme, and those of a Government which when in opposition to those laws, is not supreme.

"But if the full application of this argument could be admitted, it might bring into question the rights of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States. The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void. This is a tax on the operations of the Bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry on its powers into execution. Such a tax must be unconstitutional."

Acc. No. J.20286
Date..........
C. U.

This doctrine is known as the doctrine of Immunity of Instrumentalities. But in *Bank of Toronto* v. *Lambe*, (12 A. C. 575, the Privy Council held that a Quebec Act (45 Vic., c. 22) which imposed certain direct taxes on certain commercial Federal corporations (banks) doing business in the province is *intra vires* of the Provincial Legislature. Their Lordships at page 587 pointed out the contrast between provincial powers in Canada, and State powers in the United States as follows:—

LP2338

"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief-Justice Marshall. Every-one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with a constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution C. J. Marshall found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under S.92 which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under S. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law If they find that on the due construction of the Act a legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament"

III. (d) Can the salary of a Federal or a High Court Judge be taxed under the Government of India Act of 1935?

S. 201 and S. 221 of the Government of India Act says neither the salary of a Federal Judge nor of a High Court Judge respectively shall be varied to his disadvantage after his appointment. *See* the corresponding S. 104 of the previous Government of India Act of 1919. Ordinarily such a case may not come before the Federal Court for decision, for very few judges would think of questioning the right of the legislature to impose a tax applicable to all. But suppose the tax levied is so exorbitant as to substantially vary their salary, in which case the question is likely to be raised, to get a final ruling on the

matter considering the difference in judicial opinion on this point. A similar case arose before the supreme Court of the United States of America in *Evans* v. *Gore*, 253 U.S. 245, where the supreme Court held that the salary of a Federal judge is not liable to be so taxed, since Art. 3, S. 1 provides that the compensation of such a judge shall not be diminished during his continuance in office. In that case the question arose whether the tax on a federal judge's salary is valid. "Whether he could be subjected to such an income-tax in respect of his salary, consistent with the constitution, is the matter in issue. If it be resolved against the tax, he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the District Court. The relevant provision we are concerned with is:

'The judges both of the superior and inferior Courts shall hold their offices during good behaviour and shall at stated times receive, for their services as compensation which shall not be diminished during their continuance in office.'

"Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges. . . . . . Because of the individual relation of the members of this Court to the question thus broadly stated we cannot but regret that its solution falls to us, and this although each member has been paying the tax in respect of his salary voluntarily and in regular course.

"With what purpose does the constitution provide that the compensation of the judges, "*shall not be diminished* during their continuance in office"? Is it primarily to benefit the judges or to promote the public weal by giving them independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater or less sum per year, and thereby leave the way open for indirect, yet effective diminution, such as withholding or calling back a part as a tax on the whole? Or does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?. . . . . The particular need for making the judiciary independent was elaborately pointed out by Alexander

Hamilton in the Federalist: No 78, from which we excerpt the following:

'The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no discretion either of the strength or of the wealth of the society; and can take no resolution whatever—Mr. Hamilton said in explanation and support of the provision (in Federalist: No 79). Next to the permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. In the general course of human nature, a power over a man's subsistence amounts to a power over his will.'

"These consideration make it very plain that the primary purpose of the prohibition against diminution was not to benefit the judges, but to attract good and competent men to the Bench and to promote that independence of action and judgment which is essential to the maintenance of guaranties, limitations and pervading principles of the constitution, and to the administration of justice without respect to persons, and with equal concern for the poor and the rich. . . . . . . Obviously, the diminution may be direct or indirect or even evasive. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his service must be regarded as within the prohibition. Here the plaintiff was paid the full compensation but was subjected to an involuntary obligation to pay back a part and the obligation was promptly enforced. Of what avail to him was the part which was given with the one hand and then taken back with the other? Was he not placed in practically the same position as it had been withheld in the first instance? . . . . Apart from his salary a federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed against as if it belonged to another. If he has an income other than his salary it may also be taxed in the same way. And speaking generally his duties and obligations as a citizen are not different from those of his neighbours. But for the common good, to render him in the words of John Marshall:

'Perfectly and completely independent, with nothing to influence or control him but God and his conscience, his compensation is protected from diminution in any form whether by a tax or otherwise and is assured to him in its entirety for his support . . . . We conclude that the tax was imposed contrary to the constitutional prohibition and so must be adjudged invalid.' "

In *Miles* v. *Graham*, 268 U.S. 501, the Court held that even judges appointed after the Revenue Recovery Act of 1918 took effect, an income-tax on their salary could not be levied. The basis of the decision was that under Act III, section 1 of the constitution the salary of the federal judges was to be fixed by the Congress in a statute enacted for the purpose and that the salary as then fixed might not be diminished during his continuance in office under the guise of an income-tax. Therefore, in the Revenue Act of 1928 U.S. Statute, Large Vol. 45, Pt. 1, p. 797, the provision taxing the salaries of the judges was omitted. In Australia a different view is taken. The High Court of the Commonwealth of Australia held that the salary of a judge was taxable on the construction of S. 72 (iii) which says that the justices of the High Court shall receive such remuneration as the Parliament might fix but their remuneration shall not be diminished during their continuance in office. In that case *Cooper* v. *Commissioners of Income-tax for the State of Queensland*, (1907) 4 C.L.R. 1304, the Chief Justice of the state contended that the levying of income-tax on his official salary under the Income-tax Consolidated Act, 1902-4 and the Income-tax Declaratory Act, 1905, violated the term of S. 17 of the Constitution Act, 1867, which provided that the salaries allotted to judges were to be paid during their term of office. The High Court disallowed the claim on the ground that Imperial Acts of 1700 and 1760 regarding the English judicial salaries had never been held to be infringed by general income-tax legislation, though the High Court expressed the view that the repeal of a constitution Act by implication was not possible; a constitution Act must be amended formally and indeed the Court went so far as to hold that the only mode of dealing with such a case was for a formal alteration to be made in the constitution by a separate and independent Act. It is unfortunate that the decision was different from the reasoning.

The Dominion of Canada adopts the same view as Australia. See *Forbes* v. *Attorney-General of Manitoba*, (1937) A.C. 260. In the recent case in *The Judges* v. *Attorney-General for Saskatchewan*, (1937) W.N. 109, the question whether the salaries of Judges appointed pursuant to S. 96 of the British North America Act of 1867 are taxable was referred by the Lieutenant-Governor to the Court of appeal of Saskatchewan,

which answered the question in the affirmative, against which an appeal was brought to the Privy Council. S. 100 of the British North America Act, 1867, enacted that:

> "The salaries, allowances and pensions of the Judges of the superior district and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by their salary, shall be fixed and provided by the Parliament of Canada"

> "In the Courts below, it was pointed that the Judges are residents of Saskatchewan, they received a salary out of the revenues of the Dominion and were subject to taxation in respect of their incomes just as other residents and there was nothing in S. 100 to limit the powers of the provinces to tax their salaries, though the word used in S. 100 is 'fixed'. The same word was used in S. 91 (8) of the British North America Act in defining the powers of the Parliament of Canada with respect to the salaries of civil servants and the Court had before it two decisions of the Supreme Court of Canada—namely. *Abbot* v. *City of St. John*, (1908) 40 S.C.R 597 and *Attorney-General of Manitoba* v. *Forbes*, (1934) 3 W.W R. 681, in which a provincial income-tax upon which salaries was upheld. The latter of those two cases was appealed to His Majesty in Council in *Forbes* v. *Attorney-General of Maintoba*, (1937) A.C. 260. The decision of the Supreme Court was affirmed and the argument under discussion was therefore not now open. That, in effect, disposed of the present case also, unless judicial emoluments were, in a class apart, protected by some paramount principle making inapplicable to that form of income a tax imposed by statute in terms wide enough to include it. There was no foundation in the realities of the situation for any such conception, Neither the independence nor any other attribute of the judiciary could be affected by a general income-tax which charged their official incomes on the same footing as the income of other citizens. The Court below agreeing with, though not bound by, two decisions in other Dominions namely *Cooper* v. *Commissioners of Income-tax for the State of Queensland*, (1907) 4 C L. R. 1304, before the High Court of Australia, and *Krause* v *Commissioners for Inland Revenue*, (1929) S.A R. (A.D) 286, in the Supreme Court of South Africa, found no reason for exempting judicial emoluments from income-tax. Their Lordships were of the same opinion and would advise His Majesty to dismiss the appeal."

The American view seems to be more logical and the views of Canada and Australia more sensible.

III. (e) Federal Power of Taxation, Wide

The powers of taxation of the Federal legislature under the heading 'Taxes on income other than agricultural income' is very wide. Not only could it authorise the ordinary income-taxes on salary; but it could levy other income-taxes to meet emergency expenses caused by war, etc., on officers and ministers receiving their salary from the Provincial Government. In *Caron* v. *The King*, (1924) A.C. 999, when the Parliament of Canada enacted the Income War-Tax Act of 1917 and the

amending Act of 1919 whereby every person residing or ordinarily residing or carrying on business in Canada was rendered liable to pay income-tax a minister of the Government of a Province brought an action to declare that the Income War Tax, levying a tax on his salary was *ultra vires*, it was held that the Parliament of Canada had such a power.

IV. Corporations

The incorporation, regulation and winding up of trading corporations, including banking and insurance and financial corporations, but not controlled by a Federated state and carrying on business within that state, are matters for Federal legislation. Corporations not falling within the above description and unincorporated societies such as literary, scientific, religious, etc., fall within the provincial list. A federal corporation ordinarily would be operating in all the provinces or states. And if it is within the competence of the Federal Legislature to create a particular corporation, then it can create such a one though it confines its operations to one particular province or state. Objection could not be raised as to its legislative competence on the ground of its being, in effect a provincial corporation, though a federal corporation in name. A similar question arose in *Colonial Building and Investment Association* v. *A.G. of Quebec*, (1883) 9 A. C. 157. There it was held that the fact that a federal corporation chose to confine the exercise of its powers to one province and to local and provincial subjects did not affect its status as a federal corporation, or operate to render its original incorporation illegal and *ultra vires* of the Dominion legislature and that the corporation could not be prohibited generally from acting as such within the province. In the above case, an association, known as the Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vic., c. 203). The Association was to purchase lands, erect houses and sell them. It confined its operations to the province of Quebec. The Attorney-General of Quebec instituted proceedings for declaration that the defendant association was illegally incorporated and that it has no right to act as a corporation in the province of Quebec.

"It is contended that inasmuch as the association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial and consequently that its incorporation belonged exclusively to the provincial legislature but

surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carrying on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, namely, that the company be declared to be illegally constituted."

V. Protection of wild birds and wild animals

"Protection of wild birds and animals" is a Provincial subject. Wild birds and animals within a state do not, until reduced to possession, belong to the state and the state have the power to fix the times and the methods by which it may be captured and killed or sold. Provincial legislature has the power to enact law for the protection of wild birds and wild animals. The object of such acts might be either the preservation of wild animals and birds used for food, by the prohibition of killing and capturing and selling them, as in the case of the Nilgris Game and Fish Preservation Act (Madras Act II of 1879) or for the prevention of the indiscriminate killing of wild elephants. etc., as in the case of Wild Elephants Preservation Act (Madras Act I of 1873). Interesting questions might arise as to the validity of certain provincial or state acts relating to their capture and transportation, etc., as arose in the case of *Geer* v. *Connecticut,* 161 U.S. 519, where a law of the State of Connecticut declared unlawful to have in possession game for transportation beyond the state, even though such game had been lawfully killed during the "season". The question arose whether the state could authorise the killing of game and use it in the state, and yet prohibit its transportation to another state. The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state is to confine the use of such game to those who own it, that is, the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own. It was said in the discussion at the bar, although it be conceded

that the state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the state has here chosen to allow the people within her borders to take game, to dispose of it was made and became an object of, state commerce. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the state are allowed, it thereby becomes commerce within the legal meaning of that word. In view of the authority of the state to affix conditions to the killing and sale of game, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed without the jurisdiction of the State. The common ownership imports the right to keep the property if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce.

VI. Forests and Export duties

The subject of forests is a matter for the provincial legislature, under the Government of India Act. But while legislating upon it, care should be taken to avoid conflict with Federal subjects which are exclusively within the competence of the Federal Legislature. But levying duties of customs including export duties is a federal subject and any law relating to "Forests" should not intrude upon the province of the Federal legislature such as export duties, etc. For example, if the provincial legislature enacts a law imposing a tax upon all timber cut in a province and provides that in the case of timber used in the province there should be a release of nearly the whole of such tax and prohibits the export of it without a certificate that the tax in respect of it has been paid, then that tax would be held invalid by the Federal Court. It has been held in a case from Canada, *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company, Ltd.*, (1930) A.C. 357, that S. 58 of the Forest Act, 1924, of British Columbia imposing a tax on all timber cut in Canada and providing for a rebate of the tax on timber used in the province, but prohibiting its export without

a certificate of payment of such tax, is invalid because it was an export tax and so fell within the category of duties of customs, an exclusively federal subject.

VII. Customs duties in violation of international law

The subject 'Customs duties' falls within the federal field. Legislation on this topic may cause great difficulty in the actual working out of such enactments. Disputes are bound to come up before the Federal Court as to the validity of such enactments. Laws may be passed by the Federal Legislature imposing customs duties both within and beyond territorial waters though public international law grants to a littoral province jurisdiction over its territorial waters the extent of which is normally taken to be three miles into the sea from the low water-mark. As other nations have got an equal right to navigate the seas beyond the territorial waters, a question might arise whether a federal or a provincial legislation affecting the open seas beyond the three miles limit from the low water mark will be valid and whether any infringement of such a legislation by a subject will be an offence. An interesting case came up before the Privy Council in *Croft* v. *Dunphy*, (1933) A. C. 156, where the respondent's schooner which was registered in Nova Scotia together with her cargo consisting of dutiable goods belonging to the respondent was seized by the Canadian customs authorities while it was sailing for the high seas at a distance of 11½ miles from the coast of Nova Scotia. The validity of the seizure which was effected in pursuance of the powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 and 19 Geo. 5, ch. 16, is challenged on the ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence. The enactments impugned are contained in Ss. 151 and 207 of the Statute as amended. S. 151 provided as follows:—

"If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port—(7) For the purpose of this section and S. 207 of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion . . . . within three marine miles thereof in case of any vessel and within twelve marine miles in the case of any vessel registered in Canada".

S. 207 enacts as follows:—

"(1) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her cargo shall be seized and forfeited."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate at a distance of 12 miles from the coast of Canada. The respondent sued in the Supreme Court of Nova Scotia for the return of the ship, the cargo and damages. The trial Judge upheld the validity of the legislation and hence the seizure and his decision was affirmed by the Supreme Court of Nova Scotia. On appeal, the Supreme Court of Canada reversed the decision. On appeal to the Privy Council, Lord Macmillan, in the course of the judgment upholding the validity of the legislation observed as follows:—

"It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law. But whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers and that though the Dominion Legislature has full power to enact customs laws for Canada, yet it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast In their Lordships' opinion the Parliament of Canada is not under any disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in S. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state . . . . Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law is binding upon and must be accepted by the courts of this country, for in these courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires*. It may be that the legislation of the Dominion may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has conferred on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved for the legislation of the kind here challenged is recognised as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament in conferring

upon Canada, as it admittedly has done, full power to enact customs legislation bestowed or withheld the power to enact the provisions now challenged No question of any infraction of any international law arises. The question is a domestic one between the Imperial Parliament and the Dominion Parliament."

VIII. Naturalisation

It is for the Federal Legislature to lay down what constitutes naturalisation. By naturalisation one becomes entitled to the protection of the state and liable to the obligations of allegiance to it. The consequences that will follow from naturalisation is for the provincial legislature to decide. But the privileges attached to naturalisation, where these depend upon residence, are quite independent of nationality. In *Cunningham* v. *Tomey Homma,* (1903) A.C. 151, it was held that the Dominion Parliament has the exclusive jurisdiction on the subject of naturalisation, that is, the power to enact how it shall be constituted. The Provincial Legislature has the right to determine what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly the British Columbia Provincial Election Act (1897, C. 67, S. 8) which provides that no Japanese, whether naturalised or not, shall be entitled to vote is not *ultra vires*. The Privy Council observes in the course of the judgment at p. 156:—

"Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? The truth is that the language of the section (91 sub-S. 25) does not purport to deal with the consequences of naturalisation. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion, that is to say, it is for the Dominion to determine what shall constitute it, but the question as to what consequences shall follow from either is not touched. The right of protection and obligations of allegiance are necessarily involved in the nationality conferred by naturalisation ;but the privileges attached to it, where these depend upon residence are quite independent of nationality". Therefore their Lordships held that a British Columbia Act which prohibited a Japanese, whether naturalised or not, from having his name placed on the register of voters or from entitling him to vote at the elections for the Provincial Legislature is not *ultra vires*. But in the *Union Colliery Company of British Columbia* v. *Bryden*, (1899) 24 A.C. 580, it was held that S. 4 of the British Coal Mines Regulation Act which prohibits Chinaman of full age from employment in underground coal workings, is, in that respect, *ultra vires* of the Provincial Legislature. The difference between these two decisions is pointed out by Leofroi in his Constitutional Law of Canada at p. 114 as follows:—As to aliens the net result of the authorities in reference to his Dominion power seems to be that provincial legislatures cannot legislate against aliens, whether before or after naturalisation, merely as such aliens, so as to deprive them of the ordinary rights of the inhabitants of the Province, although they may so regislate against them as possessing this or that personal characteristic or

habit, which disqualifies them from being permitted to engage in certain occupation, or enjoy certain rights generally enjoyed by the other people in the Province."

IX. Banking, Negotiable Instruments, Money-lending, contracts relating to agricultural land; Land, rights in and over land, transfer and alienation etc.

Banking and negotiable securities are Federal subjects and the Provincial Legislature cannot enact laws affecting them. Acts to regulate all kinds of money-lending to agriculturists might be passed by the Province. But 'money-lending' is a provincial subject and one of the functions of the bank is money-lending and in the course of such business, banks have to use bills, cheques and other negotiable securities. It may be argued that the money-lending business side of banks may be legislated upon by the Provincial Legislature under the subject of "money-lending" and that if a Provincial Legislation on "money-lending" were to affect only incidentally 'banking and negotiable securities', etc., it cannot be attacked. Among other cases, the following recent case may be referred to in support of the above argument. In a case from North Ireland, *Gallagher* v. *Lynn*, (1937) A.C. 863, a question arose as to the validity of the Milk and Milk Products Act passed by the Legislature of Northern Ireland in 1934. The Act provides that a person shall not sell milk except under and in accordance with the Act and unless he holds a licence. The appellant is one of the farmers whose farms are situated in the county of "D" outside the territory of Northern Ireland but within a few miles of the boundary. He had been in the habit of selling milk in Northern Ireland prior to the Act and challenged the validity of the Act. S. 4 of the Government of Ireland Act provides that

"Subject to the provisions of this Act. . . . . the Parliament of Northern Ireland shall . . . . have power to make laws for the peace, order and good government of . . . . Northern Ireland with the following limitations, namely, that they shall not have power to make laws in respect of the following matter in particular, namely . . . . (7) Trade with any place out of the part of Ireland within their jurisdiction."

It was held that the true nature and character of the Act, its pith and substance is that it is an Act for the peace, order and good Government of Northern Ireland in respect of the "precautions taken to to secure the health of the inhabitants of Northern Ireland by protecting them from the danger of an unregistered supply of milk. Though it may

incidentally affect trade with "D", it is not passed in respect of trade and cannot be attacked on that ground. So it does not offend the express limitations of S. 4 (7) of the Government of Ireland Act, 1920. Lord Atkin added at p. 870 that

> "If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, it is not invalidated if it incidentally affects matters which are outside the authorised field. The legislation must not, under the guise of dealing with one matter in fact, encroach upon the forbidden field. Even a lawful object cannot be achieved by invaiid method."

Thus if the main object of the legislation is to regulate money-lending and in the course of such legislation, it incidentally affect banks and negotiable securities, it may not invalidate such legislation. But it may be argued contra on the strength of the reasoning in *Tenant* v. *The Union Bank of Canada*, (1894) A. C. 31 at 46 that

> "the money-lending on the security of goods, or of documents representing the property of goods was a proper banking transaction."

In this view, both the legislatures, Federal and Provincial, have the right to legislate. In settling the dispute, what is to be the solvent factor? S. 107, Cl. (1) of the Government of India Act of 1935 seems to suggest that provincial law on that subject will be valid till the Federal legislature chooses to enact a different law. Or, are we to be guided by the doctrine of "pith and substance" and say that it falls under the Federal or provincial legislature? Or, are we to say that it falls under the province of one legislature and to the extent it encroaches upon the province of the other, it is invalid according to the rule in *John Deere Plow Co.* v. *Wharton*, (1915) A. C. 330.

'Money-lending' is a term of art and requires a certain degree of system and continuity about the transaction. In *Newton* v. *Pyke*, (1908) 25 T.L.R. 127 at 128, it was held that to come under "money-lending" in the Money-lenders Act of 1900, it is not enough merely to show that a man has on several occasions lent money at remunerative rates of interest: there must be a certain degree of system and continuity about the transaction, but, seeing that the money-lending transactions in which the plaintiff has been engaged for a long time before the date of this bill had been very few, and had been mostly, if not exclusively, with persons who could be described as friends or relations, and that the plaintiff had not advertised or announced or held himself out as a money-lender, it would not be right to say that the plaintiff was a person whose business

was that of money-lending. In *Litchfield* v. *Dreyfus*, (1906) 1 K.B. 584 at 589, it was held that

> "not every man who lends money at interest carries on the business of money-lending. Speaking, generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry and provided they are from his point of view eligible."

Considered from this point it is submitted that the inclusion of 'money-lending' in the Provincial Legislative list may not authorise the Provincial Legislature to pass the Madras Agriculturists' Debt Relief Act. It may be argued that the subjects "rights in or over land, transfer, etc." No. 21 in the Provincial list empower the Provincial Legislature to reduce the rate of interest, or wipe off the arrears of interest, or rent. But what is contemplated in the list is an enactment relating to the variety of 'rights' that he has in or that he exercises over the land, and not the variety of obligations that he has created in or over the land in favour of others by mortgages or leases, etc. Further it is submitted that "contracts relating to agricultural land" falls under none of the three lists but falls under the residual powers of legislation of the Governor-General under S. 104. These considerations are likely to raise complicated questions regarding the validity of the Act before the Federal Court.*

Assuming that the Act does not conflict with the Negotiable Instruments Act, a difficult question might arise in the application of the Act regarding promissory notes, etc., made in or drawn outside Madras Presidency but made payable within it. The solution seems to be afforded by the Privy Council in *Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society*, (1938) A. C. 224, which held that although the law of the place of performance will *prima facie* govern the incidence or mode of performance, the amount of interest to be paid is not a mode of performance but part of the obligation itself and the proper law of the obligation was the law of the place where the document was executed. The facts of the above case were that the appellant, a New Zealand Municipal

* Since these lectures were delivered the question of *ultra vires* character of the Act regarding pronote debts came to be considered by a Full Bench of the Madras High Court in Referred cases Nos, 7, 8 and 9 of 1938 and the Full Bench unanimously held that 'Money-lending' and 'Agriculture' are terms comprehensive enough to make the Madras Agriculturists' Debt Relief Act IV of 1938 *intra vires*, though it indirectly hit at pronotes and other negotiable securities.

Corporation borrowed certain moneys from the respondent in 1926, issued to them debentures and interest coupons at a special rate. The principal and interest were to be paid at Melbourne, Victoria. In 1931, a Victorian statute entitled the Financial Emergency Act of 1931 was enacted which provided that interest should be reduced by 4 shillings and 6 pence for every pound of interest. The question arose whether the appellants are not entitled to get the benefit of this Act. The Privy Council overruled the appellants' contention and decreed the interest in full.

Under the Government of India Act of 1935 the scheme of the division and the distribution of legislative powers is neither exhaustive, scientific nor logical. Many technical terms are left undefined, giving room for scramble to clutch at jurisdiction. The law is bound to become uncertain for some time.

SUMMARY OF ENGLISH CASES.

McLaughlin *v.* Caledonia Stevedoring Company, Limited, (1938) A.C. 642.

Workmen's Compensation—Injury caused by accident in employment—Claim for compensation—Attempt to get employment —What workman must prove—Workmen's Compensation Act (1931), *S.* 1 (1).

Under S. 1 (1) of the Workmen's Compensation Act, 1931, a workman who is injured by accident arising out of and in the course of his employment will be disentitled to relief if he has not taken all reasonable steps to obtain employment.

Held, that in such a case the workman must prove that he has made attempts to obtain employment which have resulted in failure and he must prove reasonable attempts to get employment. An isolated attempt would not satisfy the provision; the attempts must be genuine and reasonable in volume.

Sifton *v.* Sifton, (1938) A.C. 656.

Will—Construction—Bequest made—Condition subsequent regarding residence of legatee in Canada—Bequest whether void for uncertainty

A testator by his will provided as follows: "I give, devise and bequeath all other property real and personal to my executors upon the following trusts, namely, to manage the corpus of the estate in

accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually The payments to my said daughter shall be made only so long as she shall continue to reside in Canada".

Held, that the provision that the payments were to be made "only so long as she shall continue to reside in Canada" constituted a condition subsequent and was void for uncertainty.

SAMMUT *v.* STRICKLAND, (1938) A.C. 678.

Constitutional Law—Ceded territory—Prerogative of Crown to legislate—Grant of representative institutions—Reservation of power—Malta Letters Patent, 1921 *and* 1936—ultra vires *legislation.*

The general rule is that English settlers wherever they went carried with them the principles of English law and the English Common Law necessarily applies in so far as such laws are applicable to the conditions of the new colony. The Crown has clearly no prerogative to legislate in such a case. Where, however, the territory is acquired by cession or conquest, more particularly where there has been an existing system of law, it has always been considered that there was an absolute power in the Crown so far as was consistent with the terms of the cession to alter the existing system of law though until such interference the laws remained as they were before the territory was acquired by the Crown. The principle which excludes cases of settlement from the Royal Prerogative has no application to cases where there has been a cession in the popular sense whether with or without the assent of the inhabitants.

As a general rule the grant of representative institutions once made without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist. Nor is it in doubt that a power of revoking the grant must be reserved, or it will not exist.

Campbell v. *Hall,* (1774) 1 Cowp. 204, discussed.

Held, that Malta is a colony acquired by cession, that it is subject to legislation by the common law prerogative of the Crown and that the Letters Patent of 1936 issued after the revocation of the Letters Patent of 1921 was *intra vires* and legally enforceable.

SHANNON *v.* LOWER MAINLAND DAIRY PRODUCTS BOARD, (1938) A.C. 708.

Constitutional Law—Canada—Provincial Act—Regulation of trade—System of taxation by Dominion indirectly affected—Act if ultra vires—*Delegation of power—Validity.*

The appellants who were dairy farmers were affected by a milk marketing scheme approved by the Lieutenant-Governor in Council

under the Natural Products Marketing (British Columbia) Act, 1936. The appellant contended that the latter Act was *ultra vires* as contravening the provisions as to legislative powers contained in the British North America Act, 1867. It was contended that though the Province had the power to regulate the marketing and production of natural products the legislation in question encroached on the powers of the Dominion.

Held, on a construction of the provisions of the two Acts that the substance of the local Act was to regulate the particular business and that it was not *ultra vires* merely because a licence fee was levied thereunder and the system of taxation reserved to the Dominion was indirectly affected.

Held, further, that it was within the powers of the Provincial Legislature to delegate the so-called legislative powers to the Lieutenant-Governor in Council.

ATTORNEY-GENERAL *v.* WILCOX, (1938) 1 Ch. 934.

Highways—Nuisance—Posts put upon highway—Obstruction to normal use of highway—Suit for injunction—Maintainability—Test as to nuisance

Where there is a public right of way whether a public footpath or public right of way of a wider nature over a defined area of land, the public have the right to use that defined area for the purpose of passing and repassing, and they are entitled *prima facie,* to use any part of it between the hedge or fence or other boundaries of the way, whether it be the grass verge or a portion of the way which is metalled or made up and *prima facie* it is an unlawful act to put anything on a public way which obstructs in the smallest degree the exercise by the public of their right; but the Court will not interfere where what has been done is something which is of so trivial a nature as not to constitute a substantial interference. Where the putting up of posts on a highway made the public engaged in towing process to lift the ropes over the posts and thereby caused inconvenience,

Held, that an action could be maintained to declare the posts to be a nuisance and for an injunction.

HANSCOMBE *v.* BEDFORDSHIRE COUNTY COUNCIL, (1938) 1 Ch. 944.

Highways—Extent of right—Adjoining land—Presumption regarding—Rebuttal—Trespass on adjoining land by highway authority—Liability for trespass.

The rights of the public in a high road are to pass and repass along it, and their right to use the way for that purpose is not limited to that part of the way which is metalled or made up, but extends to the whole highway. When, therefore, the whole portion of a highway

which is bounded by a fence or hedge is capable of being used to pass and repass, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch which *prima facie* is not adapted for the exercise by the public of their right to pass and repass, the presumption is that the ditch does not form part of the highway. That is a presumption which may be rebutted but the onus lies on those who assert that the ditch is part of the highway.

Held, that the presumption had not been rebutted in the particular case and that the highway authority in entering upon the adjoining land and laying pipes without the owner's permission had rendered themselves liable for an action for trespass.

In re CURRYER'S WILL TRUSTS: WYLY *v.* CURRYER, (1938) I Ch. 952.

Will—Construction—Bequest providing for alternative events—Further provision as to order of events—Rule against perpetuities—Applicability.

A testator provided by his will as follows· "On the decease of my last surviving child or on the death of the last surviving widow or widower of my children as the case may be whichever shall last happen I direct my trustees to stand possessed of the trust fund (namely, his residuary estate) in trust for my grandchild or grandchildren living at the period of distribution and the issue then living of my grandchild or grandchildren dying before that period".

Held, that the words 'on the decease of my last surviving child or on the death of the surviving widow or widower of my children' adequately expressed alternative events and the fact that the testator went on to add 'as the case may be whichever shall last happen' is not sufficient to make the gift infringe the rule against perpetuities. Consequently the ultimate gift of capital will be valid if the death of the testator's last surviving child happens after the death of the last surviving widow or widower of the child of the testator.

JOTTINGS AND CUTTINGS.

Without Lawyers.—"Those who have to administer justice," said Lord Atkin, proposing "The profession of the Law" at the banquet to His Majesty's Judges, "know full well the pitiful sight of a layman struggling to make known the real case that he had. They saw the faltering lips and heard the faltering tongue." Judges, in such a case, are habitually indulgent; but the more rope a layman is given in the conduct of his own case, the more he seems to coil it around his neck. Indeed, a man can no more be his own lawyer than—save in the simple affairs of life—he can

be his own doctor. Hearsay is to him almost the only relevance; more than the facts in issue or the documents, it is the motives that matter. Should he lose his case—as he is almost certain to do, unless he is a match for counsel on the other side—can he feel otherwise than disgruntled? He rails, not against himself, but against the law. But would the same man ascend the pulpit or take the operating table? Why, then, with such temerity, face a learned Judge? The fees he thought to save he must, in the end, disburse manyfold.—*L.J., 1938, p. 181.*

The Meaning of Words.—Nor can the world of commerce dispense, with impunity, with the man of law. "Judges were also familiar," Lord Atkin continued, "with the wealthy merchant who had to struggle in some commercial dispute with a document which he had signed but which he had either not read or, having read, had not understood, or which he had prepared himself and conceived to bear an entirely different meaning from that which the law attached to it." Sometimes it seems to be regarded as a matter of honour to take a document as read. Or, again, a layman, drafting his own document, may put down some legal terms of daily currency which he fondly imagines either to be tautologous or simply expletive. True, a merchant may know better than a lawyer the mercantile meaning of mercantile terms used in a contract for the sale of goods. But his contract, swiftly dictated in the office amid a welter of daily correspondence, and phrased either in the terse staccato favoured by commercial men or in the uncertain prolixity of a business letter—how often does it not fail to provide just for those very circumstances that are most likely to arise? The parties may have acted upon a verbal and unrecorded understanding; no deliveries have been made for months, and then, suddenly, long after the delivery period has expired, either the buyer or the seller—according to the state of the market—calls for completion. "In those straits he has to call upon the man of the law." Not that a fight must follow: the aim of the lawyer is not to breed strife, but to compose it.—*L.J., 1938, p. 181.*

The Lord Chancellor's Breakfast.—Among the famous sayings enshrined in such books of reference as Bartlett's "Familiar Quotations," is the ***dictum*** of Lord Stowell, the distinguished judge of the Admiralty Court, and the brother of Lord Chancellor Eldon, that "a good dinner lubricates business." Whether this was borne in mind by the present occupant of the Woolsack we do not profess to know, but his decision to revive what is popularly known as the Lord Chancellor's breakfast—really a

luncheon—which has been in abeyance for some years, is gratifying as a pleasant preliminary to the work awaiting the courts and the profession during the coming Michaelmas sittings. During the regime of Lord Chancellor Selborne, Lord Justice Bowen jocularly poked fun at this time-honoured function, describing it as "such a melancholy spree as Selborne's toast and Selborne's tea"; nevertheless he recognised its purpose, the bringing together in pleasant surroundings of members of the Bench and members of the Bar with its reminder that they all belong to the same great profession whose aim is the administration of justice, and all of whom are united in the common purpose of securing this end without fear or favour.—*S.J., 1938, p. 749.*

If Winter Comes.—Unbombed, and almost demobilised, we emerge in peace (we hope not without honour) from the historic Long Vacation of 1938, and enter with relief and not without hope upon the new legal year. We see before us an additional Court of Appeal, manned by three new L.J.s, whose duties and obligations are not quite the same as those of the Lords Justices we have known; for although some doubts were at first entertained as to whether there was very much difference between them, it is now generally recognised that while the old L.J.s might, the new ones must, serve as puisnes in the Courts below when required by the Lord Chancellor so to do. These heroic and self-sacrificing men, Finlay, Luxmoore and Goddard, L.JJ., deserve some meed of praise; for without any increase of remuneration, or substantial expectation of further reward, they have rendered themselves liable to perform additional duties, and must serve below or aloft according to the captain's orders. On behalf of all those on whose behalf I may be permitted to speak I thank them and wish them well.

Feelings are mixed, and opinions vary concerning the wisdom of enlarging the man power of appeals tribunals; and as one commentator inquired: Will not the illusion that appellant judges are cleverer than puisnes be largely dispelled by the magnitude of their numbers? And is there not a danger that the Law Lords, hard pressed already by appeals from home and overseas, may (unless their strength is also increased) suffer from overwork, and their judgments be still further impaired by the increase in appeals from so many courts of appeal? We must wait and see.—*L.J., 1938, p. 260.*

Judicial Changes.—Regarding the promotions—as they are sometimes called—there is general approbation, although there are

many who wondered whether Macnaghten, J., having regard to his judicial quality and exceptional knowledge of our laws, was asked to volunteer. The answer may be that he is reserved for something even better than one of these new Lord Justiceships. However that may be, there is at the moment no perceptible moaning at the Bar by reason of the judicial changes; save that, in the Chancery Division, all lawyers are not wholly satisfied by reason of the reduction of their judges from six to five. Henceforward there will be, as of yore, two pairs of judges, the odd man out being available for witness actions or relief duties as occasion may demand. If the Chancery men would, in the interests of justice, have the number of their judges restored to six, they might do it by what is known as the accumulation of arrears; yet I hesitate, in times like these, to recommend delaying action as a means of achieving this result. Without support or conscious design anything might happen in the uncertain legal year of 1938/9.

The new Puisnes of the K.B.D. were marked for promotion long ago, and the current commentary is to the effect that their appointment was overdue. The Recorders of Folkestone and of Bath must be aware that their judgeships are in accordance with general expectation.—*L.J., 1938, p. 260.*

The New Lords Justices.—The appointment of Mr. Justice Luxmoore to the Court of Appeal was generally expected. He has been, since the appointment of Lord Justice Clauson, the senior Judge in the Chancery Division, and his work there has eminently qualified him for promotion. Mr. Justice Finlay and Mr. Justice Goddard have also shown the qualities required for an Appeal Judge, and the Court of Appeal, in dividing itself into three parts, will lose nothing of its prestige. The successor to Lord Justice Greer, when his retirement takes effect, has still to be appointed, but there is every probability of the enlarged Court of Appeal being a strong Court. Under the Judicature (Amendment) Act the vacancy in the Chancery Division caused by Mr. Justice Luxmoore's promotion will not be filled until the state of business so requires, but no announcement appears to have been made so far as to how the chambers of the Chancery Judges are to be rearranged. When in accordance with the recommendation of Lord Hanworth's Committee the Probate work goes to the Chancery Division, the sixth Judge will require to be restored, and, incidentally, this will put an end to the anomalous system under which the Probate Division declines to be a "Court of construction," notwithstanding that each Division of the High Court is bound finally to determine, as far as possible, all matters in controversy between the parties.—*L.J., 1938, p. 251.*

The Third Court of Appeal.—Mr. Justice Finlay, Mr. Justice Luxmoore, and Mr. Justice Goddard have been appointed Lords Justices of Appeal. These appointments are made under the Judicature (Amendment) Act, 1938—to use the appropriate short title —which increases the number of the ordinary Judges of the Court of Appeal from five to eight. Power for the Court of Appeal to sit in three Divisions is given by sec. 68 (3) of the Judicature Act, 1925, and the increase will allow this to be done either permanently or at intervals as may be required. In a sense it is in accordance with the recommendation of the Second Report of the Business of Courts Committee that there should be as many Divisions of the Court of Appeal as should be necessary to deal with appeals. But the method is different. Under Lord Hanworth's scheme there were to be no more Lords Justices. The puisne judges were to be themselves, if we may say so, mutual Judges of Appeal. There is, however, in the new arrangement an echo of that scheme, for the new Lords Justices and all ordinary judges of the Court of Appeal hereafter appointed are to be liable to sit as Judges of the High Court. So it would seem that in days of leisure in the Court of Appeal there will be substantial help available for the Courts of first instance.—*L.J., 1938, p. 251.*

The New King's Bench Judges.—But while Mr. Justice Luxmoore's place in the Chancery Division is not to be filled up, it is otherwise with the vacancies in the King's Bench Division created by the promotion of Mr. Justice Finlay and Mr. Justice Goddard, and these have been filled by the appointment of Mr. Roland Oliver and Mr. Croom-Johnson. Both of these have attained distinction at the Common Law Bar. Mr. Oliver, who took silk in 1925, and is Recorder of Folkestone, has been engaged in many well-known criminal and civil cases. While still at the junior bar, he formed one of an interesting array of counsel who appeared for the Midland Bank in the "Mr. A Case," which Lord Darling, who had retired in the previous year, returned to the Bench to try. The others were Sir John Simon, Mr. Rayner Goddard, and Mr. Malcolm Hilbery. All are now on the Bench except Sir John Simon, who has found superior attractions elsewhere. Mr. Croom-Johnson took silk in 1927. He is Recorder of Bath, and since 1929 has been Member for Bridgwater. By the concentration of his energies on judicial work, the King's Bench Division will receive a notable accession. All the appointments are good, but perhaps his is the most promising of a very interesting batch. The new legal year begins as regards the Bench under favourable auspices.—*L.J., 1938, p. 251.*

The New Puisnes.—Croom-Johnson, J., has been M.P. for some years, but his appointment owes nothing to his politics, which may well have been a hindrance rather than a help; for it is well known that Governments do not invariably approve of by-elections for Government seats. At any rate, the appointments of Croom-Johnson, J., and Oliver, J., were, in the opinion of the Bar, fully justified by forensic merit, achievement and prestige. What is more, that appears to be the view of greater authorities, that is to say, of the barristers' clerks, who rarely err in their estimate of the quality of those who work for them; and their opinion is fortified by those of other persons hardly less authoritative, namely, the managing clerks of solicitors who do business in litigation.

The practice of Croom-Johnson, K.C., was for many years general, large and lucrative in the Supreme Court; while that of Oliver, K.C., who some years ago chiefly shone in criminal trials, has for a long time been mainly in civil actions in the Supreme Court, including the Court of Appeal, and he has won notable victories in the House of Lords itself.

Greer, L.J., is about to retire—a regrettable event—for he is beyond dispute one of the best and most generally and justly esteemed of post-war Lords Justices. His retirement will mean another promotion and another appointment to the Bench.—*L.J., 1938, p. 260.*

If They Would.—Who will be appointed and who promoted will presently appear. Meanwhile, we know that there are a certain number who might become judges if they would, and will not. Of such are Hastings, K.C., Birkett, K.C., Monckton, K.C., and certain others; and the belief is generally entertained that Sir John Simon, although at the moment he is not a practising barrister and therefore ineligible to compete for the Scrutton Cup, would not be refused a judgeship if he intimated a longing for it, on any ground other than the Government desire and his own conviction that he should continue for the present as Chancellor of the Exchequer. It is even thought that if Maugham, L.C., retired, Sir John would show the same aversion or turning away from the Woolsack which once, long ago, he made manifest, in memorable words, when Mr. Asquith was Premier.

The name of Mr. Jimmy Cassels, K.C., has been mentioned with confidence, and it is certain that, in the opinion of the Common Law men of the metropolis and of the South-Eastern Circuit, no more popular appointment could be made. Le Quesne, K.C., and Hallett, K.C., are other persons who are said to be marked, on their merits, for ultimate promotion: while the name of Mr. Harold Murphy,

K.C., is mentioned frequently when the prophets indulge in speculation and forecast.—*L.J., 1938, p. 260.*

Sir Duncan Kerly, K.C.—Placid, pale, clear in exposition, and complete master of his subject and his case, Sir Duncan Kerly, K.C., was one of the outstanding two who for many a year were the undisputed leaders in all important cases relating to patents and to trade marks. Although he retired from practice several years ago (in 1931), he was a familiar figure to all Templars, and his death at the age of 75 is deeply deplored. He was a Bencher of the Inner, and was appointed Chairman of the Board of Referees in succession to the late Sir Charles Bine Renshaw at or about the end of the Great War.

You could not tell from his accent that he had Scottish blood, but you might correctly infer it from his Christian or baptismal names of Duncan Mackenzie. Son of a solicitor, he was educated at Merchant Taylors' and St. John's Cambridge, where he was Parkin Exhibitioner. In 1884 he was ninth Wrangler, and took a First in Law in the year following. He was MacMahon Law Student in 1886, a Fellow in 1887, in which year he was called to the Bar by the Inner Temple.—*L.J., 1938, p. 261.*

More about Judicial Salaries.—In the early decades of the nineteenth century various changes were made in the remuneration of the judiciary, this being sometimes on an ascending scale and sometimes in the reverse direction, the reasons given for these changes being curious and interesting. In the reign of George IV. a series of Acts was passed, one dealing with the salary of the Chief Justice of the Court of King's Bench, another with that of the Chief Justice of the Court of Common Pleas, and a third with the Master of the Rolls, the Vice-Chancellor of England and the Chief Baron of the Court of Exchequer. The first of these Acts was 6 Geo. 4, c. 82, and is entitled "An Act to abolish the sale of offices in the Court of King's Bench in England, to make provision for the Lord Chief Justice of the said court and to grant an additional annuity to the said Lord Chief Justice on resignation of his office." The Act recites that certain offices, namely, Clerk of the Treasury and Custos Brevium, Filazer, Exigenter and Clerk of Outlawries of the Court of King's Bench were in the gift of the Lord Chief Justice and deemed to be saleable by him as and when from time to time becoming vacant, while other subordinate offices were in the gift of those officials and saleable by them, and it was expedient that these various offices should no longer be saleable, but that vacancies should be filled by the Lord Chief Justice with-

out fee, gratuity or reward being exigible by him. The Act then proceeded to declare that "it will be necessary to make due provision for maintenance of the honour and dignity of the office of the Lord Chief Justice in lieu of the valuable patronage hitherto enjoyed by him," and this was accomplished by enacting that he should henceforth receive a salary of £10,000.—*L.T., 1938, p. 293.*

Provision for the other Judges.—Two statutes immediately following that just mentioned deal respectively with the salaries of the Lord Chief Justice of the Common Pleas, the Master of the Rolls, the Vice-Chancellor of England, the Chief Baron of the Court of Exchequer and the Barons of the latter tribunal. The Act which deals with the Chief Justice of the Common Pleas has a recital similar to that which was concerned with the Chief Justice of the King's Bench, namely, that a number of offices which, till then, had been in the gift of the Chief Justice—those offices including the Second Prothonotary and Clerk of the Juries—should no longer be saleable, and consequently, this addition to the Chief Justice's remuneration being no longer available, an increase in his official salary should be granted, and accordingly it was raised to £8000. The next statute increased the salaries as follows: the Master of the Rolls, £7000; the Vice-Chancellor of England, £6000; the Chief Baron, £7000; and the Barons, £5500.—*L.T., 1938, p. 293.*

Reductions.—The next important alteration was effected by an Act passed in 1851 (14 & 15 Vict., c. 41), which is certainly curious. It is entitled "An Act to regulate the salaries of the Chief Justice of the Court of Queen's Bench and Chief Justice of the Court of Common Pleas," and then follows this curious recital: "Whereas ....the annual salary to be granted to the Chief Justice of the Court of Queen's Bench at Westminster is fixed at the sum of £10,000, and the annual salary to be granted to the Chief Justice of the Court of Common Pleas at Westminster at the sum of £8000, and whereas from the death of the Right Honourable Charles Lord Tenterden the salary of £8000 has been granted to and accepted by the Chief Justice for the time being of the said Court of Queen's Bench instead of the salary of £10,000; and whereas the salary of £7000 has been granted to and accepted by the present Chief Justice of the Court of Common Pleas....instead of the salary of £8000 fixed by the said Act: and whereas it is expedient that the salaries of the said offices of Chief Justice of the Court of Queen's Bench and Chief Justice of the Court of Common

Pleas should be regulated as hereinafter mentioned"; and thereupon it is enacted that the salaries of the two offices should be respectively £8000 and £7000. What precisely was the inner history attending this change in the amount of the salaries does not appear, but it surely must be set to the credit side that the holders of the two high judicial offices should have accepted, apparently without demur, this reduction in their emoluments.—*L.T., 1938, p. 294.*

Present-Day Salaries.—These have long been at the figure at which they stand to-day and are as set out in the Judicature Act, 1925, namely: The Lord Chancellor, £10,000; the Lord Chief Justice, £8000, The Master of the Rolls, £6000; the Lords Justices and the puisne judges, £5000. The sums are not extravagant in amount, and, moreover, they are subject to severe abatement by the operation of the Income Tax Act. To many of those who have accepted judgeships the change from the Bar to the Bench has been the reverse of advantageous from the monetary point of view. At one time it was popularly believed that when a puisne judge was promoted to the Court of Appeal it involved an increase in remuneration, but this was a misconception. As Mr. Justice A. L. Smith (about whose language there was, as Lord Bowen once said, "a distressing nudity") remarked when congratulated on his promotion to the Court of Appeal: "No more wages, you know!"—*L.T., 1938, p. 294.*

Separate Judgments.—The *Times*, in a recent leading article made the third Court of Appeal, which is now staffed for work when its services are required, the occasion for a discussion of law reporting, and of the practice of Judges, where several sit together, to give, save in the Judicial Committee and the Court of Criminal Appeal, separate judgments. On this latter point—the giving of separate judgments—the hope is expressed that "one Court one judgment" will become the rule. The present practice savours on the contrary of *Quot judices tot sententiae.* As to which produces the more interesting results there can be no doubt. With all respect to the Judicial Committee, its single judgments—and how much difference of opinion they cover may not be revealed—are very much inferior in interest to the varied judgments of the House of Lords. And since the two tribunals have largely the same personnel, the inferiority is due solely to the different methods of announcing the result. The majority judgments in the House of Lords give the decision; but we can see the conflicting principles which have been tested, and the understanding of the law gains by the conflict, even though the result cannot be disputed.

The House of Lords are always right, because, as Lord Justice Scrutton is reported to have said, there is no one to tell them they are wrong. The House cannot even go back on its own decisions and reverse them, as can the Judicial Committee and the United States Supreme Court in a later case. That this should be so may be unfortunate, but the rule was decisively affirmed by Lord Halsbury, L.C., in *London Tramways Co.* v. *L.C.C.* (1898, A.C. 375; 67 L.J. Q.B. 359).—*L.J., 1938, p. 269.*

Judge-made Law.—It is not too much to say that the House of Lords reports would lose half their interest if dissent was not admitted. Of course, in the Court of Appeal the plan would not work at all. There would have to be not three, but ten Courts if the Lords Justices had to sit, like jurymen, till they could agree on a judgment. Indeed, without a dissentient judgment, such as that of Lord Justice Moulton in the *in camera* Scott case (1913, A.C. 417; 82 L.J. P. 741), how would the House of Lords get its cue to reverse the Court of Appeal? So for the present we shall be content to see judicial divergence recorded in the law reports, the majority judgment prevailing, and in a Court of two, the junior Judge withdrawing his judgment. The reporting of decisions is, of course, a necessity, as much so as the printing of Acts of Parliament, for case law is a more prolific source of law than legislation, though Parliament is a good second. Moreover, no small part of case law is devoted to deciding what Parliament meant. Of course, it is said that Judges do not make law; they only apply old principles to new circumstances. The matter is discussed by writers of repute: Grey in *The Nature and Sources of Law*; Allen on *Law in the Making,* and we need not pursue it here. For practical purposes it is sufficient that lawyers have to go for the law to the reported cases even more than to the statutes, and though there is no gainsaying an Act of Parliament when it is to the point and clear, advice is more often given, and a case won, on the strength of an apt decision.—*L.J., 1938, p. 269.*

Law Reporting.—As to law reporting, which was the other matter dealt with in the *Times* article mentioned above, this, as we have said, is a necessity. The only question is how and to what extent it should be done. As to how a report should be compiled, it is suggested that space could be saved by omitting citations from earlier reports. Sometimes this is done, especially where the citation is long. But to cut out citations as a general rule would main the report and deprive it of much of its utility. It may be granted that the consulting of numerous reports imposes a burden on the

lawyer, and not unnaturally it is reflected in costs. But this is incidental to the English system of jurisprudence. There is no suggestion that the system should be altered, and the points to be considered are what should be reported and how can the decisions be made readily accessible. Sir Frederick Pollock said in a paper on English Law Reporting, read before the American Bar Association in 1902 and printed in his *Essays in the Law*, "Utility to the profession is the only test." That is quite true, but in practice opinions may differ as to what is useful to the profession. The value of the reports, of which Sir Frederick was for so many years the distinguished editor, is not doubted; also of the *Times Law Reports*, to which attention is called in the leading article referred to above; and of other contemporary reports. The profession, indeed, has reason to be grateful for the good work done by the law reporters. And the somewhat more liberal interpretation of what is useful to the profession which is adopted in the *All England Law Reports* and the acceleration of production is also doubtless appreciated, while as to tracking down a case, the Digests have turned that into a game.—*L.J., 1938, p. 269.*

Sir Thomas Hughes.—Sir Thomas Hughes, K.C., who died last Monday, at the age of 82, was for a good many years before his retirement, in 1931, the most prominent leader at the Chancery Bar. Coming of a Lancashire family, and educated at Birkenhead School, he went to Trinity College, Cambridge, and after entering at Lincoln's Inn, and being called to the Bar in 1880, he joined the Northern Circuit and practised for many years at Liverpool. In 1898 he came to London and, taking silk, joined the Chancery Bar. Those were the days when Chancery leaders attached themselves to particular Judges, unless they held themselves ready to "go a-roaming" for special fees. Hughes, notwithstanding his ability, never went special, though his ties of attachment changed from Mr. Justice Byrne to Mr. Justice Farwell. Finally, when in October, 1900, Ingle Joyce went to the Bench of the Chancery Division in succession to Mr. Justice Stirling, who became a Lord Justice, Hughes joined Mr. Justice Joyce's Court, and practised there, with Younger as an even rival, until the latter was appointed to the Bench in 1915. Hughes was an old pupil of Ingle Joyce, and rumour said that his persuasive geniality contributed materially to the conduct of the business of the Court. It is singular that he never himself became a judge, for his temperament and learning, and his position at the Bar, seemed to

make him an obvious choice for appointment. However, judicial preferment did not fall to him, but from 1900 he served as a member of the Bar Council, and became Chairman in 1920, a position which he held till his retirement from practice. In 1926 he was knighted. Through all these later years he acquired a special place in the esteem and affection of the Chancery Bar.—*L.J., 1938, p. 285.*

BOOK REVIEWS.

THE LAW RELATING TO PLACES OF ENTERTAINMENT AND AMUSEMENT. Published by K. Venkoba Rao, M.L., Advocate, 1/31, Nallathambi Mudali Street, Triplicane, Madras. 1938 Edn. Price Rs. 15.

This book, as is obvious from the title, is a comprehensive treatise dealing with almost all the activities of the people for whiling away their leisure hours. No doubt one feels much struck by the literary language of the author even in the preface to this volume and our interest is only increased to know, as we progress, that the author has combined much diligence with precision of ideas in the preparation of such a ponderous volume.

We cannot say exactly which particular chapters or subjects here will be more interesting than the rest, for there will be as many orders and degrees of preferences as there are readers. The author does well to introduce in his first chapter the main outline of the cinematographs, sketching the history of the screen industry in the various parts of the world. But cinematographs are again dealt with separately in Chapter III where the English Film Acts have been duly noticed including the Films Act of 1938 which came into force only in April, 1938. As regards Theatres and Dramas we have a fund of information given in Chapter II and the relation between the theatrical proprietor and the artiste has been adverted to in the proper place and with due proportion of its importance. The English authorities on the subject have been carefully collected and discussed, and in the last portion of the same chapter the Indian Law relating to theatres is also dealt with. The Entertainment Tax Acts passed by the various Indian Provincial Legislatures in recent years have been mentioned in the Index with full texts as well as the Rules framed under them. The interesting topic of libel actions by Sound Films necessarily find a place in Chapter IV whose interest is really enhanced by the elaborate discussion of the Rasputin Action. The next chapter gives an idea of Sunday Entertainments with their legal incidents. About the spectators of a Cricket Match—not an absorbing game merely but a growing

craze with the young and old in modern times—and their rights against the authorities regarding accidents caused by the hitting of balls, we have a chapter where the subject is put to a critical examination in all its entire legal bearing. The next few chapters have a good deal of discussion about Billiards, Races, Lotteries and Crossword Competitions, etc. In Chapter XI we are provided with knowledge of the existing law in America pertaining to entertainments and amusements of the kind dealt with in the previous chapters with a lot of case-law on the various subjects. Chapter XII specially gives an account of the Cinematographs Bill in the British Parliament and the important speeches of members during the three readings of the Bill. The appendices contain full and extensive texts of the various English and Indian Acts grouped under proper headings.

It needs no great imagination to realise that a subject like the one the author has chosen has great possibilities of growth under modern conditions with the great scientific advances made in the Radio and the Television. We therefore hasten to congratulate the young author for being almost the first in India to have written a sumptuous treatise on this little explored branch of the law and given adequate information for lawyers and laymen alike. We also believe that the work will be found very useful to magistrates, police officers and other licensing authorities.

SPEECHES OF BHULABHAI DESAI. Published by G. A. Natesan & Co., Madras. 1938 Edn. Price Rs. 3-8-0. Foreign *7s. 6d.* Postage Extra.

We know how eminent English Lawyers like Erskine and Russell, superb successes at the Bar, turned out to be great failures in the House of Commons. Perhaps it was F. E. Smith (later Lord Birkenhead) who proved the exception to the general rule that a lawyer with a reputation made in his profession is more often disappointing in Parliament. We have for the lawyer of our country the further handicap of a foreign language as the vehicle of expression, apart from the many other disadvantages resulting from lack of adequate training and tradition in parliamentary procedure. It is therefore doubly praiseworthy if an Indian lawyer of repute should claim the palm for parliamentary eloquence and debating capacity of a high order. Sri Bhulabhai Desai has now been acclaimed a very successful party leader and a splendid parliamentarian.

When he joined the Congress he had already made his name in the legal profession. Naturally therefore his debut into

the Assembly was watched with keen interest by all sections of the public. Needless to say that he has satisfied all the canons by which a member of a deliberative body modelled on the House of Commons in its procedure should be judged. He has shown great powers of sustained and clear thinking upon any subject he might be called upon to deal with in the Assembly. Facility of speech and a naive realism added to his own individual sterling qualities have gained him the amount of confidence and leadership that at present he enjoys. What powerful influence the art of speech has on us and what subtlety and versatility the legal brain is capable of when faced with weighty national problems as well as the huge opposition of an unsympathetic Government, will be evident from a perusal of these copious speeches.

We are really thankful to Messrs. G. A. Natesan & Co., for the very idea of collecting the speeches of an outstanding advocate, no less renowned for his patriotism and sacrifices in the cause of his motherland. One has only to read carefully his utterances upon the many [illegible]cs such as Indian Defence and the Criminal Law Amendment Act to be greatly impressed with the legal acumen and pow[illegible] of analysis that he brought to bear upon the deliberations of the Assembly. We feel real pleasure in commending such a valuable publication to the discerning public.

STATUTE LAW RELATING TO RELIGIOUS ENDOWMENTS by P. R. Ganapathi Aiyar, Advocate, Madras. Price Rs. 4.

Mr. P. R. Ganapathi Aiyar is a recognised authority on the subject of Religious Endowments and his treatise on Hindu and Mahomedan Endowments is the leading text book on that branch of law. The profession was eagerly looking forward for a new edition of the book as there has accumulated a large mass of case-law on the subject in the course of over twenty years that have elapsed since the publication of the last edition and so far as Madras is concerned, the local legislature has repealed Act XX of 1863 and an altogether new enactment has taken its place. The book under review is not a new edition of his book on the Hindu and Mahomedan Endowments; but the learned author has traced in it the growth of the Statute Law relating to Religious Endowments from the commencement, stating their effect without giving the text of the statutes themselves. The learned author has not rested content with tracing the growth of the statute law on the subject in British India, but has dealt with the regulations on the subject in the Indian States as well. He has given his valuable suggestions as to how the provincial governments should deal with these public trusts and their endowments in the future. The appendices

give the text of the various regulations in the Indian States on the subject and the Charitable and Religious Trusts Act of 1920. It is needless to add that the learned author has dealt with and discussed all the relevant decisions. We have every hope that the book will be found a very instructive one and will be used with profit both by the Bench and the Bar.

FOR NECESSARY ACTION.—Speeches and Judgments of Sir Douglas Young, Edited by Shri Ram, B.A., LL.B., Advocate, High Court, Allahabad and V. M. Kulkarni, B.A., LL.B., Editor, Indian Cases, Lahore. Published by the Indian Cases, Ltd., Lahore.

This is a collection of some of the notable speeches and judgments of Sir Douglas Young, the Chief Justice of the Lahore High Court on topics of public interest. It is well known that Sir Douglas Young has set his heart in rooting out corruption in the public service in the Punjab and has achieved a large measure of success in his laudable endeavour. The speeches are refreshing in their candour and are also marked by sympathy. The subjects dealt with in the speeches are not merely of local interest but have a wider appeal to all reformers in every field of public activity. The book is not a legal text book and will be read with profit by all those interested in the welfare of the future of this country.

MEDICAL JURISPRUDENCE by M. A. Kamath, M.B. & C.M. (4th Edition), 1938. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 6.

This edition appearing as it does nearly nine years after the third edition has come none too soon. The subject which is of interest to lawyers and medical men has been dealt with in all its branches lucidly and with precision. Since the publication of the last edition, there has been an accumulation of learning on the subject necessitating alterations and additions in the present edition. An additional feature of this edition is the addition of a chapter on the Workmen's Compensation Act. The author having had long experience as a member of the medical service has drawn largely from it in illustrating the several points dealt with in the course of this book. We have every hope that the book will be found useful as a reliable hand book on the subject, specially suited to Indian conditions.

THE
MADRAS LAW JOURNAL.

I] MARCH [1939

SIR SRINIVASA VARADACHARIAR.

We offer our respectful congratulations to Sir S. Varadachariar on his elevation to a seat on the Bench of the Federal Court of India. When he was raised to the Bench of our High Court in 1934, he reached the highest goal of professional ambition. On the passing of the Government of India Act, 1935, a higher judicial appointment became available in India and he has now reached that higher haven. But for his hesitation over the suitability of a judicial career for one of his temperament, he might have been a Judge of the High Court for well over ten years. He has now been the recipient of the added honour of a knighthood. His friends have deep satisfaction in the fact that places and honours came to him unsought.

Sir S. Varadachariar began life in humble circumstances. With a brilliant academic career, he became early in life attached to Sir V. Bhashyam Aiyangar as almost a member of his household. Few know that his higher destiny checkmated and overruled the well-meant effort of his friends to get him appointed to a place in the clerical establishment of the High Court and saved him from the obscurity which would have been his portion had that effort succeeded. After Sir V. Bhashyam Aiyangar became judge he passed into the office of Sir P. S. Sivaswami Aiyar. His association with these two eminent men influenced and moulded him in the early years of his professional life. Shy and retiring, he might have long remained unknown. An article in the pages of this journal which was a critique on the judgments of the two greatest Judges of the time immediately arrested the attention of competent men to his learning and ability. His growth and progress in

the profession was slow and steady. It is said that slow growth indicates a longer career and the reaching of higher heights and Sir S. Varadachariar's life illustrates it. His advocacy showed constructive imagination. His presentation was lucid, at times subtle, and always fair. Unlike most lawyers he argued without making notes. Without conscious effort on his part to impress, he managed to make a deep impression on the Judges in the course of years. Sir Owen Beasley, C. J., had great respect and admiration alike for his intelligence and character. He once remarked that the statement of a principle by Sir S. Varadachariar made futile the citation of a vast and carefully collected array of authorities. Deeply religious by temperament and training, he acted steadfastly on principles which he laid down for himself as a man, as an advocate and as a Judge. A certain almost aggressive simplicity characterises his life outside Court. As a lawyer he seldom took up a case that he considered unjust or unarguable. As a Judge, he was painstaking and more patient than some of his friends expected from the clear decisiveness of his mind. Complaints have been heard that he came to Court with his mind made up and gave little chance to the argument of counsel. But he has not been unknown to change his mind when he was shown reason for doing so. In this respect, he was not like Sir V. Bhashyam Aiyangar who rarely changed his very carefully formed conclusions. Sir S. Varadachariar has given great satisfaction to the profession. He has a wide circle of friends in the Bar and on the Bench. The impression that he made on the present Chief Justice soon after his arrival in Madras and the deep personal attachment between him and Sir P. S. Sivaswami Aiyar are worthy of special mention. Not without deep feeling did his many friends at Madras separate from him.

We have no doubt that the high distinction he has achieved as a judge of the High Court will mark his career as a judge of the Federal Court also. The functions of the Federal Court are in the region of constitutional law, but are not in essential respects different from the functions of other judicial tribunals. We have heard expressions of doubt as to whether the judicial work in a High Court may not have the effect of tinging with narrow legalisms the decisions of those larger constitutional questions that will come before the Federal tribunal. Sir S. Varadachariar is a student of history. He has less faith in books than in deep

reflection. He cares and has always cared for depth rather than for breadth. And in the hours of leisure which the less strenuous life of a Judge gave him he has kept himself abreast of the times by careful and selective study. Even his innate conservatism has yielded to the compulsive quality of the time spirit.

This journal owes gratitude to Sir S. Varadachariar who was for twenty years its Editor and a worthy successor to the three first illustrious editors. All of them reached the highest places as public servants. We wish Sir S. Varadachariar long life and full period of service as Judge of the Federal Court.

Sir Alladi Krishnaswami Aiyar, Advocate-General, on behalf of himself and the other members of the Bar bid farewell to Mr. Justice Varadachariar on the eve of his departure from Madras as Judge of the Federal Court.

Sir Alladi Krishnaswami Aiyar said:—"In the course of the last few years, I had several occasions to bid farewell to Judges who retired from the Bench in this Court, but none so unique as the present, when I am saying good-bye to Your Lordship on your transfer to a wider and, may I say, a higher sphere of work. In taking leave to express our appreciation of your work both at the Bar and on the Bench I have necessarily to put some restraint on myself as I feel a certain amount of embarrassment by reason of the fact that you still continue to be a Judge, and some of us hope to appear and plead on occasions before you in the Federal Court and in the Supreme Court if, as it is hoped ere long, the Federal Court becomes the normal appellate tribunal from the High Courts in this country.

"I can claim to have known Your Lordship's work at the Bar intimately almost from the commencement of my professional career. Very early in your career at the Bar, by your singular devotion to the study of law, you acquired a reputation for learning and keen grasp of the principles of law. In the formative years of your professional career you had the singular good fortune of coming under the influence of some of the ablest and most notable names at this Bar, Sir V. Bhashyam Aiyangar, Sir P. S. Sivaswami Aiyar, who happily is still with us, and the late Mr. V. Krishnaswami Aiyar, whose broad-based intellectual generosity and appreciation of talent, wherever it was to be found, is too well known to need mention.

"At a period when many a young practitioner's time is taken up with the struggle to make a living in this most competitive of

professions, Your Lordship was able to pursue your legal studies with zeal and single-minded devotion by working in the Chambers of your learned leader, Sir P. S. Sivaswami Aiyar, and assisting him in the conduct of difficult causes involving complicated and intricate questions of law.

"Your intimate connexion with the Madras Law Journal almost from the commencement of your professional career and your editorship of that Journal for several years have won for you a prestige scarcely rivalled, excepting perhaps by the illustrious first founders of the Journal.

"After the first few years, your talents came to be recognised in the Profession and attracted the litigant public of this Presidency; your advocacy arrested the attention of the Judges, before whom you appeared, and you sprang to fame and distinction in the forensic field outdistancing most of your compeers at the Bar.

"By your learning and ability, your penetrating intellect, your mastery of the intricate details of every case, your suave manners, the reputation you earned for scrupulous and fair presentation of your clients' cause and your exposition of the legal principles involved in it, you attained a position at the Bar which made some of your compeers occasionally feel a sense of handicap when appearing against you before some of the Judges of this Court.

"It is a source of great pleasure and pride to me that in our early years at the Bar we together assisted and instructed leading counsel in some of the important cases and in later years I had the privilege of opposing you on several occasions. From my intimate acquaintance with you at the Bar, I can bear testimony to your uniform courtesy, kindliness of spirit and the great forbearance you showed at any lapses on the part of your opponents. My professional contacts with you have served to accentuate my esteem and, may I add, affection for you.

"When, after your distinguished record at the Bar, Your Lordship was raised to the Bench in March, 1934, the universal feeling was that the right man was in the right place and that nature specially equipped you for a distinguished judicial career. Hardly had you taken your seat on the Bench, when the profession began to realise that a new vigour had been imparted to every Bench in which you took part.

"While you were not oblivious of the changing conditions and the environment of a new age your career on the Bench was not marked by any desire or tendency to give any particular direction to the development of the law, the main function of the Judge

being to administer the law as he finds it and not assume the role of a legislator. In your Court no case suffered or could suffer for bad or tactless advocacy. The complaint could, if at all, only be that you knew every aspect and detail of the case and left little scope for the Advocate's art in the matter of the exposition of the law or in unravelling the complicated facts of a case.

"I hope I am not guilty of any impropriety when I say that the impression gained ground among the clientele and the profession that any case before you was in safe hands and that it could not suffer for want of skill in advocacy. It is not always that a brilliant lawyer makes a distinguished Judge, but in your case your legal learning was subordinated to your passion for justice. An unfailing courtesy, an artless simplicity without the least sacrifice of judicial decorum and dignity held the admiration and friendship of all that came in contact with you.

"Accumulation of arrears in this Court, the obvious necessity for speedy despatch of judicial business, the multiplication of case-law with as many as 11 High Courts at work in different parts of India and a continuous stream of decisions of the Judicial Committee do not afford much scope for a Judge to devote sufficient time to the writing of erudite judgments with a punctilious regard to form and nuances of style. But in spite of the prevailing tendencies of the times, even within the comparatively short period of five years, Your Lordship has delivered many leading and learned judgments in several departments of the law, which may well stand comparison with some of the great judgments of the past.

"There is hardly a Full Bench decision in this Court within the last four years in which you have not taken part.

"The new sphere in which you are entering will give ample scope to your great legal and scholarly attainments and enable you to make a lasting contribution to the jurisprudence of this country in the constitutional field and in the field of private law if and when the Federal Court is invested with ordinary appellate jurisdiction.

"The Madras Bench is distinctly the poorer on your being taken away from our midst and it is not easy for any one to fill your place. But we shall not grudge the benefit of your services to a Higher Tribunal.

"The Bench and the Bar are equally proud of the position which you have been called upon to fill, and the good wishes of the Bar go with you in your new sphere of work."

Mr. Justice Varadachariar's Reply.

I am glad of the opportunity given me to bid good-bye to you all. I cannot be sufficiently grateful to the Advocate-General for all the kind things that he has said of me and my very close acquaintance with the Advocate-General is a source of great embarrassment to me in referring to them in detail. There is, however, one part of his speech to which I can refer without any embarrassment and indeed with the greatest satisfaction, namely, to acknowledge in as emphatic a term as possible and as openly as I can the debt of gratitude that I owe to some of the leaders under whom it had been my privilege to learn and to work. I may almost say that their example had been the loadstar of my life and it was their help and encouragement which had made it possible for me to even enter the profession and afterwards to find my way through it. The statements contained in the other parts of the Advocate-General's speech, it is not for me to canvass and I would leave it to the audience, excluding myself, to decide how much of it they can accept at their face value.

Next to acknowledging my obligations to my '*gurus*' in the profession, I have an equally pleasant acknowledgment to make to the numerous members of the Bar, both old and young, whom I had the privilege to come in contact with. Their attachment to me was due more to their kind nature than to anything in me. I hope that nobody would mistake me when I say that in the earlier years of my life in the Bar the Andhra friends took to me more heartily than others. It had always been one of the happiest memories in my life. In the latter years of my career, it had been my special privilege and pleasure to have been treated perhaps even more kindly than I deserved by many learned Judges before whom I had to appear.

After I became a Judge, my position was made even happier by the honoured colleagues with whom it had been my privilege to sit. My brother, Mr. Justice Pandrang Row, used to refer to me as his elder brother; sometimes even behind that humorous remark I could detect an element of truth. My relations with my colleagues have been of the most cordial character. More than all, I am under a special obligation to the two Chief Justices with whom it has been my good fortune to work. The fact that Sir Owen Beasley has now left this Court is no reason why I should not acknowledge in the most generous terms the extreme kindnesses which were extended to me on all occasions. After my Lord the present Chief Justice assumed office, I have been treated with even more kindness and consideration than I could have expected from a life-long friend.

I have also received the most loyal help and co-operation from the officers of the High Court.

I now wish to deal with my relations with the Bar. Before doing so, may I say a word or two of explanation or even apology. I am particularly gratified by the reference which the Advocate-General made to what the Bar felt when they had occasion to appear before me. I cannot conceal from myself the fact that there had been several occasions when I had sorely tried the patience of the members, but I can assure you that such occasions were the result of what I have always conceived as a common effort in which we are all engaged—an effort to find the truth and to do justice. I believe that members of the Bar would have noticed on many occasions my face betraying the struggle within me—the struggle to get at the truth. I would like to take this opportunity of making an unreserved apology for any offence that I might have unwittingly given on any occasion. But I am happy to think that such occasions have been comparatively few. On the other hand, my memory of these five years is almost a continuous memory of a happy co-operative endeavour between the Bench and the Bar to do justice according to the best of our lights.

If I may repeat, without any breach of confidence, the appeal that I made to my brother Judges yesterday, I would say that I have always desired, and I hope I shall not desire in vain, the utmost cordiality and co-operation to exist between the Bench and the Bar. It naturally requires certain qualities in those who sit on the Bench and certain qualities in those who are in the Bar, to secure the maximum cordiality. Every one of us realises the supreme importance of the task which the administrator of justice is concerned with. And it has always been the ambition of the Bar to be regarded as a limb in the administration of justice and not merely paid agents. If the Bar will only be true to that ideal and tradition, I see no reason why the Bench should not recognise that character of the Bar and should not appreciate the endeavours of the Bar from that point of view.

In this connection, I recollect an incident which has always stood out before me as marking the high water-mark in professional idealism. Even at the time the incident happened, it created a stir. In a case which my leader, Sir P. S. Sivaswami Aiyar, had to argue before Sir S. Subramania Aiyar and another learned Judge, my leader appeared for the respondent and he was aware of a Privy Council case which, if quoted, the case would go against him and which his opponent had not stated. My leader could not sleep the whole night, because he was torn by a sense of conflict between his duty to his client and

his duty to the Court as an Advocate. He consulted friends and ultimately he pointed out the case to the Bench and that settled his case. I have referred to that point to emphasise the fact that, while the gentlemen of the Bar owe a very serious responsibility to their clients, they also owe an equally responsible duty to the Court and that, if the Bar wish that it should be recognised as a necessary and an honourable limb in the administration of justice, it must find some way of reconciling these two apparently irreconcilable duties. All theories about the traditions and the ideals of the Bar practically relate to this apparently irreconcilable conflict of duties I have no doubt that the estimation in which the Bar is held by the Bench will depend upon the realisation of the Bar upon this aspect of this question. It is far from me to suggest that the Bar should, in the slightest degree, depart from the trust which the clients impose in them, but just as there is such a thing as presumption of knowledge of law even by the most ignorant persons, the traditions of the profession presume that every client, when he engages the services of a Counsel, knows that Counsel is in a position of trust not merely to himself but also to the Bench. I am emphasising this because of my anxiety that the Bench and the Bar should feel that they owe a common duty to the public in the matter of administration of justice and that the best co-operation between them can be attained only to the degree to which the Bar realises this aspect not merely theoretically but as a matter of day-to-day conduct.

I need hardly expatiate upon the reputation which the Madras Bar has attained for efficiency and character. We have had comparatively a short existence, when we think of the life of the Bar in countries like England. But within the short period of its existence, the Madras Bar has had the advantage of professional idealism, practised by eminent members of the English Bar such as Mayne and Norton and latterly we have had the example of veterans who could hold their own with any member of any Bar like Sir V. Bhashyam Iyengar, V. Krishnaswami Aiyar, Sir S Subramania Aiyar and P. R. Sundara Aiyar. Even on the Original Side, we had eminent men like Anandacharlu. The tradition has been handed down to us by stalwarts and giants and it is no wonder that our Bar stands to-day in the highest estimation in the world; but the great heritage only adds to our responsibility to safeguard it properly and to hand it down to posterity, if not improved, at least undiminished. I am emphasising this particularly in view of the unfortunate conditions prevailing to-day.

I do not wish to dwell upon the most gloomy side of the life of the Bar as it obtains at the present day. It is common knowledge

that the difficulties particularly of young men are indescribable. What remedy can be found has been seriously considered by some of our eminent men. The latest contribution to the subject was the speech of Sir P. S. Sivaswami Aiyar the other day. One is bound to feel that speeches have not carried us very far, at any rate, when it comes to rupees, annas and pies. I feel it my duty to warn younger members not to give way to despair even during the gloomy days. After all, we are hoping for better days ahead and if, in the meanwhile, you lower the ideals or the standards, the high place which you now enjoy will certainly go down. In these critical days, it behoves the Bar to be all the more careful to see that this reputation is kept up untarnished.

I would like to refer to my disappointment at the growing lack of interest in the theoretical study of Law. I had been told when I broached the subject to some of my friends that there was a close interaction between the Bench and the Bar even in that matter and if the Bench did not very much care for theoretical study and discussions, it was hardly worth the while to expect the Bar to do that. As the Advocate-General had said, the Bench is under a great handicap in these days in the matter of pressure of work and of time. It is therefore too much to expect them to indulge in theoretical discussions. But I do not think that that shows indifference to theoretical discussions. The Bar, at any rate the younger section, have abundant leisure and I would appeal to them to cultivate their theoretical knowledge. It is the ambition of many to fill the position which the Advocate-General is now holding in the profession. That is a very laudable ambition, but I would tell them to go some day to the Advocate-General and ask him in his leisure hours how many dusty volumes and how many old English reports he had pored over. One cannot expect to have the fruit without the labour. It might be said that even with the labour, there would not be any fruit now-a-days. But I assure them that labour will always be rewarded. Take it from my own life as to how conscientious endeavour will not go in vain. People may differ as to the quantum of reward. That is all the appeal I venture to place before you in all humility and with all confidence that that appeal will not go in vain. I do not wish to preach any homily, but I am so jealous of the reputation of the Bar and so much pressed by the duty that we owe to the great leaders who have adorned this Bar, that I thought that I will not be misunderstood if I emphasised this aspect of the duty which the Bar of the present day owes both to the past and to the future.

JOTTINGS AND CUTTINGS.

Lord Justice Greer's Retirement.—While it was generally known that Lord Justice Greer, the senior of the Lords Justices, had for some time contemplated retirement, that intention, now that it has become ***un fait accompli,*** will be received with great regret by the whole legal profession. He will indeed be greatly missed in Court of Appeal No. 2, where for the past few years he has been the presiding Lord Justice, for to a masterly grasp of the law he united a kindly human feeling towards all who practised before him or who otherwise came in contact with him. To all he was the perfection of courtesy, and this was once again manifested in his farewell statement in court in which he said that he had always endeavoured to treat the judgments of the King's Bench Judges—those of the Chancery Judges rarely, if ever, came to Court of Appeal No. 2—with the greatest courtesy, holding, as he did, that it was most undesirable that anything should be said which might detract from the weight that should be attached to their decisions. This trait was eminently characteristic of his kindly heart, and was indeed the very antithesis of that taken by some of those who in the past have sat in the Court of Appeal, and who seemed to take a malign delight in ridiculing the alleged lack of law and reason in the pronouncements which it fell to them to review. It was further an additional instance of the kindliness of the Lord Justice that in his valedictory observations he did not forget to thank the two ushers of the court, who had reduced as far as possible the physical handicap through arthritis from which he suffered, by providing him without delay with the books of reference necessary to be consulted. Incidentally he mentioned that it was only on the strong advice of the late Lord Justice Scrutton that he had agreed to leave the King's Bench Division and become a Lord Justice. This, we may say, was not the least of the many services that great lawyer rendered to the public. A distinguished lawyer himself, with, perhaps, a predominance of the ***fortiter in re*** over the ***suaviter in modo,*** Lord Justice Scrutton realised the juristic and personal worth of the Lord Justice who has now retired.—*S.J., 1938, p. 857.*

THE
MADRAS LAW JOURNAL.

I] MARCH [1939

LAW AND RELIGION.*

THE HON'BLE MR. JUSTICE S. VARADACHARIAR.

The subject of this lecture is not only a topic of historical and theoretical interest, but also one of some practical importance at the present day. Many a well-meaning reformer in this country attempts to seek the aid of the legislature to quicken the pace of reform. Such attempts are sometimes opposed as endangering religion. A dispassionate study of the relation between law and religion is thus of more than academic interest. It is however necessary to recognise, at the outset, that the matter is one on which there is likely to be honest difference of opinion.

The word "religion" has been used and understood in different senses, and in the present discussion, I refer to religion in the sense of a faith in an unseen Power which controls the destinies of mankind, and whose existence, powers and commands are unknowable except through some kind of revelation. The inter-relation between law and religion has arisen or has persisted in many ways and from many causes. The belief of any community as to the origin of law, the theories prevalent in the community as to the origin and functions of the State, the ideas accepted by that community as to the meaning and purpose of life, the sanctions by which social duties were or had to be enforced in the community, the classes or authorities

* Address delivered during the Golden Jubilee Celebration of the Madras Advocates Association, February, 1939.

who were the repositaries of legal knowledge and were responsible for the development of law and the tribunals by which justice was administered,—these are the principal factors to be considered in this connection. Religion not merely consists of a bundle of creeds and dogmas but inculcates a particular way of life arising out of and consistent with its philosophy as to the meaning of life. In so far as that way of life involves theories as to man's duties to himself and to his fellowmen, these theories must profoundly influence the concepts underlying the system of law by which its followers govern themselves. A vague religiosity or a mere sentiment of religion without a definite philosophy of life is hardly likely to have much influence on man's social behaviour.

The conception of law has undergone change from stage to stage of human history. We have been so used to the Austinian conception that we are apt to forget its limitations and historical contradictions. A study of the works of the historical and comparative schools of jurisprudence will be a useful corrective to this tendency. Vicissitudes of political history in different parts of the world brought in their trail radical changes in some places in the connection between law and religion. In the West, the separation between law, religion and morals, between the Church and the State, between legal tribunals and ecclesiastical tribunals proceeded apace. The history of the East was different. There can be little doubt as to the necessity and advantage of a certain degree of separation between religion and law. The growing secularisation of life, the necessity for administering and enforcing the law through temporal tribunals with the aid of temporal sanctions and the inevitability in modern conditions of legislation by temporal authority emphasise the need for such separation. This, however, is different from postulating the divorce of law from religion. The author of the Sukra Niti observed that a minister should recommend to the King the enactment of laws calculated to secure happiness both here and hereafter. With this might be compared the statement of a recent western writer that a scientific statesman who would attempt to prescribe codes for human conduct without regard to the religious nature of man was as likely to fail as the religious reformer who prescribed codes without regard to human nature.

INTER-RELATION OF LAW AND RELIGION.

The intimate connection between religion and law, was a characteristic of the early stages of many systems of law. Among the Hebrews the connection between the two will be evident from the Pentateuch. Even in the case of systems like the Roman and the English, which in their advanced stages have been held up as models for the world, the inter-relation between law and religion in the earlier stage has been recognised, and traces of the influence of religion on law are still to be found in some branches of the English law, especially those relating to marriage and descent of property, wills, etc. Among the Mahomedans, the *Quoran* and the sayings of the Prophet are regarded as authoritative sources of law. Among the Hindus, the *Vedas* and *Smritis* form living sources of law and the connection between religion and law had continued so long as to form almost a ground for condemnation of the Hindu Law according to one school of thought.

It will be scarcely possible to deal with the historical aspects of the subject within the limits of this lecture. Some aspects have been dealt with by Sir Henry Maine in several of his lectures. One lecture re-printed in "Early Law and Custom" bears the very title of to-day's lecture. Interesting and historical information will also be found in Pollock and Maitland's History of the English Law. The development of Mahomedan Jurisprudence has been described by Sir Abdur Rahim in his Tagore Law Lectures. There are many who think that some of Maine's theories cannot be accepted as universally true and that others require to be qualified. Some of Maine's observations about the Hindu Law it would be impossible to accept as fair or correct. He seemed to regard the Hindu Law as full of "monstrous iniquities" and as having been "perverted in different directions by the priestly class". Such observations I venture to think can be the result only of imperfect acquaintance with Hindu Law books as only very few were available to Maine in those days. It was further not easy for a European critic to view these books with a sympathetic imagination. Maine also seems to me now and then to have yielded to a temptation to enunciate neat antithetical propositions by way of contrasting the Hindu Law with the Roman Law of which he was a great admirer. For this reason and also on the ground

that the history of the Hindu Law, its present condition and the lines of its future development are of more direct interest to us here, I propose to devote the rest of this lecture to the relation of Law and Religion in that system.

It is common knowledge that the *Vedas* and the *Smritis* are held to be the inspired sources of Hindu Law. Though these are regarded as embodying the portion ordinarily referred to as *Vyavahara*, it will be scarcely right to think that Hindu scholars treat every statement in the *Vedas* or the *Smritis* as standing on the same footing as every other statement. It is the misconception on this point that has led to erroneous ideas about the unalterability even of the *Vyavahara* portion of Hindu Law. The Mimamsa School has made an attempt to analyse the various portions of the *Vedas* under different categories, such as statements embodying *Vidhi* and *Nisheda* and statements in the nature of *Arthavada* and *Anuvada*. It is only portions classified as *Vidhi* or *Nisheda* which are unquestionable and unalterable. In regard to the others, even the orthodox school recognises that they are not equally authoritative as *Vidhi* and *Nisheda* portions. Sankara found no difficulty in putting aside not merely *Purvakandas*, but even considerable portions of the *Upanishads* as being only in the nature of *Arthavada*. The author of the *Smriti Chandrika* has stated in one place that all directions contained in the *Smritis* with reference to *Vyavahara* are in the nature of *Anuvada*. (Ch. I, Pl. 27.)

Numerous passages are to be found in the Sanskrit authorities suggesting some kind of 'compact' (if not contract) in relation to political society; but in the main the Hindu theory of the state was monarchical. The king was the gift and the representative of God: but the Hindu conception of the divine origin of kings was very different from the theory of the Divine right of kings prevalent in Western countries. The Hindu concept never placed the king above the law in the sense in which the Divine Right theory did. It was never the Hindu theory that the king could change the law as he pleased. He was merely expected to enforce law. That accounted for the great difficulty that later Hindu lawyers felt in changing Hindu Law even where they felt re-adjustments necessary to meet changing conditions.

In the theocratic State the king was responsible for the due observance by his subjects not only of the precepts of law but also of the precepts of religion. This accounted for and helped the intermingling of civil and religious duties and temporal and religious sanctions.

In regard to the scope and purpose of law there is a difference between present-day concepts and earlier ones. Separation of law, religion and morals is much more characteristic of modern thought than it was of ancient thought and life. There is no word in the Sanskrit language which has the same connotation as the word 'Law'. The Hindu conception of *Dharma* represented obligations and duties prescribed by the *shastras* for man's conduct in life as much towards God as towards his parents, wife and children, brothers and sisters, king and fellow-men. In the earlier *smritis*, these obligations were discussed together and it was only the later *smriti-kartas* that made the differentiation between *Achara, Vyavahara* and *Prayaschitta.*

Comparatively scanty information is available as to the kind of judicial system that was in vogue in ancient India. There are no doubt elaborate descriptions in Manu and Kautilya about courts of law, but except some kind of arrest and suretyship for the performance of the decrees of court, there is very little information as to the way in which decisions of courts, for instance, were enforced in those days. As regards procedure, they seemed to have to some extent employed the system of examining witnesses. Whether there was appreciation of evidence in the modern sense, or whether evidence was weighed by the number of witnesses on either side, or whether a tribunal depended on its own knowledge of the details of a case, it is not easy to determine. But one thing is certain; judges, parties and witnesses all were in fear of lying and they proceeded on the footing that the oath had some value. Hindu theory always associated a *drishta-phala* and an *adrishta-phala* with every act of man; hence the recognition of religious sanctions even for civil duties. That at one stage religious sanctions must have been found on the whole effective even in enforcing civil duties can scarcely admit of much doubt. I am free to own that I entertain grave apprehensions as to the efficacy of temporal sanctions in these days; for temporal sanç-

tions so far known to man seem to be losing their force. Imprisonment for debt has practically been abolished. The facilities afforded by the Insolvency Laws are freely availed of by debtors to benefit themselves at the expense of their creditors. The oath or affirmation administered to witnesses by our courts does not seem to ensure truthfulness. Even imprisonment for crime has no value as a deterrent. Modern criminology has indeed little place for *sanctions*; it only seeks to correct or reform the criminal.

As regards the tribunals that administered law in ancient days, we find that panchayats existed from ancient days. I cannot say much as to its being of Dravidian or other origin, but there was certainly the analogue of the panchayat in the *Dharma Shastras*. Whatever a man did was assumed to be done —that was clear from the Hindu's *sankalpa* before beginning any act—in the presence of a *parishad* with a personality distinct from that of the individuals composing it. The *parishad* was assumed to be one of learned, at any rate honest, men and whether it was concerned with a civil dispute or a *prayaschitta* or other ceremony the influence of a *parishad* was there and was felt. The idea of a judge distinct from the jury does not appear to have emerged very clearly in the ancient Hindu legal system. In some books there were references to appeals to and administration of justice by the King. But one could not gather that all this was of such a nature as to promote a system of law as such. It was not until there came into existence some kind of centralised empire and centralised administration of justice that there could be anything like the development of a scientific system of law in the modern sense.

HOW CHANGES WERE EFFECTED.

As I have already stated, law according to the Hindu conception was not considered as something which a king or other temporal authority could alter. It was only on the lines suggested, *viz.*, of classification into *Vidhi* and *Nisheda* or *Arthavada* and *Anuvada* that they could at all bring it within the power of commentators to make changes by either attempting a reconciliation of different texts or laying emphasis on one or the other of the texts, or by emphasising the theory of *Anuvada* so as to say that even what was stated in the

sacred books might be changed, or by insisting that law was after all worldly and should, therefore, every now and then be brought into conformity with practices and conditions prevailing in the country. In the *Mitakshara* for instance there is a definite statement to the effect that, notwithstanding the *Vedas* authorising or insisting upon a particular act, nothing abhorrent to the ideas of the world should be done. (*See* Ch. I, S. 3, Pl. 4.) It was by such processes of interpretation that changes of law had to be attempted.

The Nibandha works come into more modern history. The attempt to find out what exactly was the state of society in the days of Manu must, largely be speculative. But the view of many European writers that the state of society described by Manu must be something in the nature of an ideal society was a mistaken one. No fair-minded reader could say that the twelve classes of sons or the eight kinds of marriages, the numerous kinds of inter-marriage, the classification of descendants of such marriages or similar other provisions of the Code could be deemed to represent an imaginary state of affairs. A close study would show that what was stated therein was a set of facts that prevailed at the time, though the preferences indicated showed really what the *smritikarta*, would suggest as the better course. The most important point to remember in following the changes in law was that far from religion or religious ideas having ever put back legal ideas, it was under colour of religion that the best advance was made so far as Hindu Law was concerned. The way in which the law-givers of those days brought about a change from the unapproved forms of marriage to approved forms of marriage was by insisting that wives taken in the unapproved forms of marriage were unfit to participate in religious ceremonies. Many other reforms in law were effected by appealing to religious considerations. For instance, the way in which polygamy was discouraged by the *smritis* was by a refusal to accord a status for purposes of religious ceremonials to any wife, other than the first. Much the same process was adopted to supersede the subsidiary sons, except the Dattaka. Religion was thus the one sanction and an effective sanction that law employed in its own amelioration. In view of all this, the criticism that

"In the East, the religious oligarchy, with a view to increasing and consolidating its own influence presented to the world a code, not so much of

rules actually observed as of rules which the priestly order considered to be proper to be observed",

betrays utter ignorance of the history of the *Dharma Shastras*. In the very beginning of the *Sutras of Apastamba*, there is a reference to *Samayacharika*, rules derived from the practice of the world and of the community. This showed the factor that largely influenced the contents of the *Sutras*.

As to the familiar diatribe against the priestly order, I am compelled to say that it rests on an imperfect knowledge of the standard of life that the *Dharma Sastras* insisted on for the members of that order. If that standard has not always been lived up to, it is not the fault of the *Dharma Sastras* or of the founders of the system contemplated by them. I cannot do better than invite a comparison between the conception of that order as developed in the *Smritis* and Plato's concept of the philosopher-statesman. The idea underlying both conceptions is that there should be a class of citizens:

"Who shall have no wealth, want no wealth, take no interest in wealth, but live entirely for other things; their physical needs shall be supplied by a lower class of functionaries who shall go on desiring wealth and working for rewards of wealth". (E.J. Urwick, The Social Good.)

(*To be continued*)

THE
MADRAS LAW JOURNAL.

I] MARCH [1939

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1939.

[*Changes Income-tax law as from 1st April, 1939.*]

BY

M. SUBBARAYA AIYAR,
Advocate.

Within the last two years we have had three important measures brought before the Legislature which affect practically every person who is in some way or other connected with the trade and commerce of the country. Of these, the Indian Companies (Amendment) Act and the Insurance Act were passed into law in the two previous years. This year, the Indian Income-tax (Amendment) Bill has been passed by both the Legislative Assembly and the Council of State and assented to by the Governor-General. It may not be too much to claim that by far the most important of these three measures is the new income-tax legislation. Income-tax with all its intricacies is a subject of perennial discussion and everyone in contact with commercial affairs knows that tax considerations enter into every bargain and financial transaction. The days are past when the tax involved was relatively small and one could with equanimity be indifferent to it. It is almost true to say that income-tax is very often the most important single item in an annual account as it represents a compulsory payment out and not an item of mere debt due on accounts. Hence it is essential to exercise continual watchfulness in regard to the effect of transactions in relation to income-tax, and to understand exactly what the implications of the legislation are.

The New Act is called an Amending Act but there is hardly any section of importance in the present Act which is left untouched. Some sections which have been substituted in the place of the existing ones and others which have been newly introduced have radically altered the existing law and after incorporating the present amendments, one will find that he has got practically a new Act. In the present Act there are 96 sections comprising the original sections and the additions under various Amendment Acts. As many as 65 out of the 96 sections have been amended, 6 sections completely substituted, 5 sections omitted and 14 newly added. Complications of interpretation are inevitable and the help of professional men would be more constantly required under the new enactment than under the old.

The Act is frankly designed to bring in more revenue to the Exchequer by closing all existing defects or loopholes in the Act leaving no chance for tax dodgers being left free and by extending the scope of taxation by bringing into the net fresh items of income. The administrative machinery has been strengthened and improved so as more effectively to deal with evasion of tax. It has been claimed by the framers of the Bill that there has been no fundamental alterations but on a perusal of the provisions one feels that there have been sudden and abrupt variations of the principles of taxation. It is likely that the Income-tax Officer will apply the letter of the law as it suits revenue best.

The assessment of foreign income has been the most contentious and complicated item of discussion in the Assembly. Indeed at one stage, it appeared that the Bill would not be proceeded with. But Sir James Grigg skilfully avoided such an ending and with the co-operation of the Congress Party and the Muslim League, a compromise formula was adopted and passed by the Assembly under which foreign income is made assessable on an accrual basis despite its non-receipt in British India.

The main changes and the new provisions of the Amending Act are best considered under distinct headings. References given are to the sections of the 1922 Act.

I. Compulsory returns.
II. Return of information and furnishing particulars.

III. Basis of assessment.
  (a) Resident and ordinarily resident.
  (b) Resident but not ordinarily resident.
  (c) Non-resident.
  (d) Residents and non-residents rate of tax.

IV. Special provisions against avoidance of tax.
  (a) Limited companies and accumulated profits.
  (b) Transfer of assets abroad.
  (c) Transaction in Securities and sales cum dividend.
  (d) Settlements and Trusts.
  (e) Dividends.

V. Change from the step system to the slab system.

VI. Salaries.

VII. Firms registered and unregistered.

VIII. Assessments of Insurance Companies.

IX. Right to carry forward losses.

X. Depreciation allowance on plant and machinery.

XI. Allowance for Life Insurance Premia.

XII. Deduction of tax at source.

XIII. Making of additional assessments and reopening of assessments.

XIV. Assessments, Appeals and Administrative Machinery.

XV. Amounts hitherto not assessable now made assessable.

I. Compulsory returns

A system of compulsory returns has been introduced in S. 22. Each person whose total income exceeds the taxable limit must voluntarily send a return of income within 60 days of the income-tax authorities giving notice by publication in the press and an assessee may apply and obtain extension of time for the delivery of the return. Hitherto there was no pecuniary penalty leviable by an Income-tax Officer for non-submission of a return but only a prosecution before a Magistrate under S. 51 of the existing Act. Now, pecuniary sanction by way of imposition of penalty by the Income-tax Officer himself for non-submission of returns is provided for. The penalty for non-submission of a return is up to a limit of 1½ times the tax levied, while the penalty for non-production of evidence after submission of a return is less, that is, up to a limit of 1½ times the difference between the tax leviable on the returned income and the income assessed. But in the case of a person whose total income is less than Rs. 3,500 or in the case of an agent of a non-resident, no penalty can be levied for non-submission of return unless a notice calling for

a return of income is served on him. If a person who has failed to submit a return even after being served with an individual notice calling for the return of income proves that he had no assessable income, a nominal penalty is leviable up to a maximum of Rs. 25.

II. Return of information and furnishing particulars

(*i*) Hitherto persons who pay interest of Rs. 1,000 and above had voluntarily to furnish a return of the names and addresses of all persons to whom such interest was paid and now the limit has been reduced to Rs. 400.

(*ii*) Every person engaged in any business, profession or vocation should furnish along with this return of income full particulars of location and style of principal place, branches, names, addresses and share of partners.

(*iii*) The assessee, when required, has to furnish a statement of persons to whom rent, interest, commission, royalty or brokerage, etc., amounting to more than Rs. 400 is paid in any year.

(*iv*) The officer may require any person to furnish particulars of all securities of which he was the owner during the year for the purpose of discovering whether through any transaction or dealings in the securities, he has evaded payment of proper tax. Failure to give such information entails a very heavy penalty.

(*v*) The trustees of approved superannuation funds and employers who contribute to approved superannuation funds have, when required, to furnish particulars of contributions, the names and addresses of every person in receipt of annuity, the amount of the annuity payable to each annuitant, contributions returned to the employer or employees and of sums paid in commutation or in lieu of annuities.

(*vi*) Where an employer pays emoluments to employee or makes on his behalf any contributions of that employee to an approved superannuation fund he shall include all such payments and contributions in his return of income under S. 21.

III. Basis of assessment

The new Act makes a differentiation between classes of residence—resident and ordinarily resident, and resident but not ordinarily resident—as affecting taxability.

Persons who are resident in British India and also ordinarily resident have to pay tax on (*a*) income accruing or arising in British India, (*b*) on hitherto unassessed foreign income from 1st April, 1933, brought into British India and

(c) each year's foreign income accruing from 1st April, 1938—a sum up to Rs. 4,500 in this category is not taxable in that year if it is not brought into British India. But even here the same will be liable to be taxed in later years as and when it is brought into British India. Persons who are "resident" but are "not ordinarily resident" in British India have to pay tax (a) on all income accruing or arising in British India, (b) on foreign income brought into or received in British India, and (c) on all income accruing or arising out of a business controlled in or a profession or vocation set up in India whether brought into British India or not. It will thus be seen that the difference in the basis of taxation between the above two classes of residents is that while the person who is resident and ordinarily resident in British India pays tax each year on all his income, British Indian and foreign, on the accrual basis ("total world income"), the person who is resident but not ordinarily resident does not pay tax (a) in respect of income accruing or arising outside British India from a business not controlled in or a profession or vocation not set up in India and (b) in respect of income accruing or arising otherwise than from a business controlled in or a profession or vocation exercised in India. Nevertheless, such income is liable to be taxed in his hands as and when the same is brought into British India. In the case of persons who are not resident in British India, the tax is payable only in respect of income accruing or arising or deemed to accrue or arise in British India.

The definition of residence is in substance as follows:—

To be a resident an individual must have been (a) in British India for half the number of days in the year (to be correct 182 days) or (b) must have maintained a dwelling house in British India and must have visited British India at least once during the year or (c) must have been in British India for periods amounting to a year during the preceding four years and must have visited British India during the year otherwise than on an occasional or casual visit. An individual is "not ordinarily resident" if he is not resident in British India in nine out of the ten preceding years or if he has not during the seven preceding years been in British India for a total period of two years.

A company is deemed to be resident in British India if it is wholly controlled in British India or if more than half its entire income arises in British India. It is ordinarily resident in British India if it is resident in British India. Thus there is no distinction between residence and ordinary residence in the case of a company. So in the case of a company, if it is controlled wholly in British India or its income arising in British India is more than half its total income, then it is taxable on all its world income. If it is controlled in India (though not wholly in British India) then it is taxable (*a*) on its income arising or accruing in British India and (*b*) on its income from business arising anywhere and (*c*) on its income from other sources as and when received in British India.

When we come to the definition of the residence of a Hindu undivided family, we find that it is resident unless the control and management of its affairs is wholly outside British India and it is deemed to be ordinarily resident only if its manager is ordinarily resident in British India. So that, if the manager of the undivided Hindu family is a non-resident, the resident family is liable to be taxed only on its income accruing in British India and on its foreign income received in British India and on its other income derived from a business controlled in India.

In the case of firms or other association of persons, they are resident and ordinarily resident if they are not wholly controlled in or managed outside British India. Here again the observations made in respect of a company controlled or managed in India apply with equal force.

The rate of tax applicable to residents and non-residents is different. The resident is assessed on the rate applicable to his income. A distinction is also made among the non-residents between British subjects and non-British subjects. A non-resident who is a British subject or a subject of a State in India or Burma pays income-tax and super-tax on his total income at the average rate applicable to his total world income. A non-resident who is not a British subject pays income-tax at the maximum rate on his total income and super-tax at the average rate applicable to his total world income.

No provision has been introduced here as in U. S. A. to compel non-residents to satisfy the Government, before they

leave this country, that they have paid all tax due in respect of income earned here.

IV. Special provisions against avoidance

The rising burden of income-tax and super-tax has brought about many methods of avoidance of this liability very largely through the media of company formation and transfer of assets to others both in and out of British India and making settlements of income or properties. When super-tax was first imposed in 1917, the maximum rate for income-tax was 1 anna in the Rupee and for super-tax 3 annas in the Rupee. The first Rs. 50,000 was exempt from super-tax. Rates have since been increased. The present maximum income-tax rate together with surcharge is $28\frac{1}{8}$ pies in the Rupee and for super-tax 6 annas and $9\frac{1}{4}$ pies in the Rupee. The exemption limit was lowered to Rs. 30,000 from Rs. 50,000. Individuals having substantial incomes thus pay heavy sums by way of tax, and therefore there is the incentive to reduce the income-tax and super-tax burden to the lowest possible limits.

As the machinery of avoidance was very widely adopted in relation to the following matters, the Government felt its duty to close up all material loopholes in regard to:

(*a*) Limited companies and accumulated profits.
(*b*) Transfer of assets abroad.
(*c*) Transactions in securities and sales cum dividend.
(*d*) Settlements and Trusts.
(*e*) Dividends.

(a) Limited companies and accumulated profits

A most convenient method of avoidance was to form companies in and out of British India transferring assets to them so that the income (British Indian and foreign) accruing to the companies and accumulated in the companies' hands may avoid taxation either by not distributing dividends or by distributing income in the shape of capital. As the machinery of companies was successfully employed for legitimate tax avoidance and it began to be widely adopted, the Legislature attempted to dam the leakage by enacting S. 23-A of the Act. The issue of income in the form of shares instead of dividends by the retention of the company's income with the company itself was held to be capital receipt and this principle was applied even to cases of issue of debentures by the company.

The several requisites necessary to set in motion S. 23-A machinery led to great uncertainties and possibilities of chal-

lenge varying with types of businesses and the Crown had also to prove that the avoidance was with an intention to evade payment of tax before a direction could be made under the section. The section was applied only in two cases and it could not be made use of in other cases.

S. 23-A is now made applicable to all companies in which the public is not substantially interested, and not merely to companies which are under the control of not more than 5 persons. The section says that where the profits and gains distributed as dividends by a company up to the end of the sixth month after its accounts for the previous year are laid before the company in the General Meeting together with the income-tax payable thereon is less than 60 per cent. of the assessable income of the company of the previous year, the Income-tax Officer shall unless he is satisfied that having regard to losses incurred in earlier years or to the smallness of the profits made, the payment of a larger dividend would be unreasonable make an order that the assessable income shall be deemed to have been distributed as dividend among the shareholders and included in the shareholders' total income. Where the accumulated undistributed profits exceed the value of the fixed assets or the paid-up capital together with any loan capital belonging to shareholders 100 per cent. is substituted for 60 per cent. A further provision is also made to make allowance for a possible case of error in which though if 60 per cent. of the assessable income of the company has not been actually distributed, an amount not less than 55 per cent. has been distributed and the company is given a chance to rectify the defect by distributing the balance of 5 per cent. also.

The proviso has also been altered so as not to apply the section to subsidiary companies of a company in which the public are substantially interested if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof. Further consequential amendments have been made to the section and it is also made clear that where a company is a shareholder of a company to which the section applies the amount of the dividend deemed to have been paid to the shareholder company shall be deemed to be part of its total income for the purpose of application of the section to distribution of profits by the shareholder company. The tax due by the shareholder is now to be recovered from

the company, only if it cannot be recovered from the shareholder. The previous approval of the Inspecting Assistant Commissioner is also necessary before an order is passed by the Income-tax Officer.

S. 33-A of the Act which provided an appeal from a decision of the Income-tax Officer under S. 23-A to a Board of Referees has now been omitted and an appeal is provided to the Appellate Assistant Commissioner under S. 30.

The amended section relieves the Income-tax Officer of the duty of determining whether the profits and gains are allowed to accumulate beyond its reasonable needs, existent and contingent, having regard to the maintenance and development of its business and an enquiry as to whether there was an intention to evade payment of super-tax by the members.

(b) Transfer of assets abroad

The new S. 44-D has been enacted to bring into the net of taxation persons who with a view to avoid tax transfer their assets abroad to persons or to companies incorporated outside British India.

These are cases where by a transfer of assets and by a series of transactions, income is paid or becomes payable to a person 'not resident' or to a person 'resident but not ordinarily resident', but the person who so manages the affairs is really in control of and in some cases in enjoyment of the income of such other person. This provision is analogous to cases of settlement of income on others while in fact the settlor has power over or in enjoyment of the income. Such cases are intended to be caught by this new section.

The section will not apply to genuine formation of foreign corporations and transfer of assets, but the assessee has to show that the formation of the company or the transfer of assets was not for avoidance of tax.

(c) Transactions in securities and sales cum dividend

Under sub-Ss. (1) and (2) of S. 44-E it is provided that if an owner sells or transfers securities, stock or shares and by the agreement of sale or by any collateral agreement buys back or re-acquires the securities, stocks or shares any interest or dividend thereon which as a result of the transaction becomes receivable by any other person is to be deemed to be

the income of the original seller for all the purposes of the Act, that is, income-tax and super-tax.

Under sub-Ss. (3) and (4) it is provided that where any person carrying on business which consists wholly or partly in dealing in securities, stocks and shares buys or acquires securities, etc. and under the agreement for purchase or collateral agreement sells back or retransfers the securities, etc. and the result of the transactions is that interest is receivable by him, no account shall be taken of the transaction in computing his profits or loss in business.

The scope for avoidance referred to above was due to the legal position that interest on securities and dividends did not accrue day to day but were receivable only on the day the holder is entitled to draw them.

This provision has been introduced as it was found that several lacs of rupees per annum representing tax on interest on securities, etc., were being refunded as a result of owners of securities, etc., of large sums arranging with a person not liable to income-tax or liable to a lower rate of tax to sell or transfer those securities to him shortly before interest or dividend becomes due, and to buy back or get a retransfer after interest or dividend is paid. The original seller receives interest or dividend in the form of price that is capital appreciation not chargeable with super-tax, and where the purchase is made by a person or company whose business is to buy and sell securities, and he resells shortly after the payment of interest or dividend, loss in the transaction is allowable to him and could be set off against other income received by him.

S. 44-F deals with a case of an individual liable to super-tax escaping super-tax by selling his securities in the market and rebuying after the interest date, thus escaping super-tax on the capital profit.

(d) Settlements and Trusts

A variation in the ordinary Law of Trusts is introduced in S. 16 of the Act to cover certain cases of evasion of income-tax. In England the Law of Trust was utilised as a device to evade tax and special provisions were made. The various Finance Acts and Part 4 of the English Finance Act of 1938 contains a fasciculus of sections designed to deal with such cases. Similar provisions are also enacted under the Indian Amending Act to

deal with income transferred by way of settlements or dispositions or revocable transfer of assets with a view either to evade tax or to make the tax payable at lesser rates. The section deals with those classes of cases in which provision is made for the retransfer directly or indirectly of the income or assets to the transferor or settlor or in any way gives him the right to reassume power directly or indirectly over the income or the assets.

The section does not apply to those cases of settlement or disposition which are not revocable for a period of six years or during the lifetime of the settlor or disponer and from which income he does not derive any direct or indirect benefit and is unable to obtain for himself the beneficial use of the income.

The section applies even to transactions before the Amending Act and to all cases of Trusts or Settlements however *bona fide* they may be which come under the provisions of the Act. In effect those dispositions or transfers to which the section applies are to be regarded as having been made with a view to evasion of income-tax.

The conditions obtaining in India do not lend scope to the wide use of the Law of Trusts for evading taxation, and Trusts are usually effected in this country to provide maintenance for dependant relatives and members of one's family, the corpus reverting to the settlor when the purpose of the Trust is served.

In the present provisions, the maxim that the way in which one's income is applied cannot affect the liability to tax of the person to whom the income arises is applied. In other words the arrangement is treated as a method of utilisation of or an expenditure out of one's income and should be regarded on the same footing as items of expenditure which are not allowable deductions under the Act. Taxpayers are liable to pay tax upon items of income which they cannot themselves enjoy.

Under the present Act, trustees or guardians for several beneficiaries are treated as an Association of Persons and single assessments on income belonging to several beneficiaries or wards were made in the hands of the trustee or guardian. This has been rectified in the Amending Act by making the assessments on trustees at rates applicable to the income of each beneficiary, the trustee being assessed only as the agent of each

beneficiary. The tax to be paid by the trustee is analogous to that of an employer paying the tax due by the employee on salaries.

All income howsoever, and for whatever period settled is deemed to be income of the settlor where the assets remain with the settlor. This is intended to bring into the net of taxation persons who retaining the corpus settle on others the income not liable or liable to a lower rate of tax. This prevents the wide use to which rich assessees may put the law of trusts settling income on dependent relatives and servants, themselves having a control over the income. But where the assets and income both pass and the settlement is not revocable for a period of six years or for the lifetime of the settlor or disponer, the case is outside the pale of the Act and is not taxable in the hands of the settlor. But even here once the power to revoke operates the Act applies.

(e) Dividend

One of the usual methods adopted to avoid super-tax which would otherwise be payable by shareholders was to distribute profits in the form of capital receipts like bonus shares, bonus debentures, etc., which under the law as it stands at present will not be income in the hands of the shareholders and hence not liable to tax.

"Dividend" has now been defined to include thereunder the distribution of capitalised profits which entails release by the company to the shareholders of any assets of the company and debenture-issues out of the accumulated income. The new definition covers the case where a company goes into liquidation and distributes the accumulated profits which arose prior to the 6 previous years of the company preceding the date of liquidation and also includes any distribution by a company on the reduction of its capital to the extent to which the company possessed accumulated profits which arose after the end of the previous year ending next before first day of April, 1933. The "dividend" as now defined is included in the definition of income. The definition is aimed more at shareholders of companies formed for the purpose of reducing tax payable by individual shareholders than at companies carrying on legitimate business. It does not include any distribution by way of bonus shares as it does not entail release of any assets by the company but only

means the user of such assets in the company itself by way of increase of capital.

Under Explanation (3) to S. 4 (1) a 'dividend' paid without British India is now to be deemed income accruing or arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

Until now under S. 14 'dividend' received by a shareholder was exempt from taxation to income-tax in his hands. This exemption proceeded on the 'idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payments of income-tax by the company would discharge the quasi-partners'. The consequence of this legislative outlook was that a "dividend" was really a division of profits and when a payment is made to shareholders it is a mere distribution for which the shareholders incurred no liability. The new Act has deleted 'dividends' from S. 14 and dividends will no longer be exempt from taxation.

As a corollary, by a new S. 49-B payment of income-tax by a company is deemed payment by a shareholder on so much of the dividend as the amount of income on which the company has paid income-tax bears to the whole income of the company.

By amendment to S. 18, 'dividend' is placed on the same footing as interest on securities and credit is to be given in the assessment of the shareholder for the appropriate amount of tax.

The effect of the above provisions of the Amendment Act is that shareholders are now made liable to be taxed even in respect of income which was exempt in the hands of the company.

V. Change from the step system to slab system

Another great change in the system of taxation in the Amending Act is the introduction of the slab system. Under this system, every slice of income is taxed at a particular rate. The rate on higher incomes increases as the income increases. It was stated by the Finance Member that under this system on the basis of the standard rate suggested by the Income-tax Enquiry Committee which has now been adopted, all persons getting incomes of Rs. 8,000 and under will pay less than the present tax, while of the persons getting incomes between Rs. 8,000

and Rs. 24,000, some will pay less and some more and persons getting income of over Rs. 24,000 all will decidedly pay more as tax. The introduction of this system has also necessitated the insertion of a clause providing for the calculation of tax in cases where out of the total income, certain sums are exempted from payment of tax, namely, life insurance premia, etc. In such cases the tax shall be an amount bearing to the total amount of income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted, the same proportion as the unexempted portion of the total income bears to the total income.

VI. Salaries

Under the Act as it stands income under the head salaries was taxable only on payment and receipt. Tax was being postponed or evaded by postponing the receipt of salary or by taking advances or loans.

The Act has now been amended to cure these defects so as to make sums due under that head liable on the date when they are due whether paid or not, and advances by way of loans or otherwise of income are hereafter deemed salary due on the date they are received.

But to safeguard against possible hardships to the employees due to the insolvency of the employer or other causes, the employee cannot be called upon to pay the tax himself unless he has received the salary without such deduction.

The Privy Council decision in *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace & Co.*[1] held that capital sums received as a sort of solatium for compulsory cessation of business or in commutation of pension, or a consolidated compensation for death or injuries or in payment of insurance policy or the accumulated balance from a Government Provident Fund cannot in any scheme of taxation be regarded as income. Income has now been defined in the Act as including a profit received in lieu of salary as provided in explanation (ii) to sub-S. (1) of S. 7. This explanation says that a payment due to or received by an employee from an employer or from his Provident Fund at or in connection with the termination of his employment (not including his own contribution) is to be deemed salary provided it is a payment not made for loss of

1. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: I.L.R. 59 C. 1343 (P.C.).

office but by way of remuneration for past services. The result of this is to nullify the effect of the Privy Council decision to the extent stated.

Exception is however made in favour of payment made out of recognised provident funds and approved superannuation funds.

Changes have also been made in regard to deduction of tax at source. Hereafter not only income-tax but super-tax should be deducted at source and provision has also been made to deduct income-tax and super-tax at specified rates in respect of salaries paid to non-residents.

By Explanation (2) to S. 4 (1) all income which would be chargeable under the head salaries if payable in British India and not being pension payable without British India, is deemed to accrue or arise in British India wherever paid if it is earned in British India.

The Legislature is able to deal with such cases by deeming it income accruing or arising in British India and securing the tax thereon by providing for deduction of tax at source.

For example if a person entered into a contract of service with his employer in British India and was appointed as a travelling representative outside British India, he will be liable to tax on his salary even though his salary was payable, under the contract, outside British India.

VII. Firms—Registered and unregistered

The position of Registered and Unregistered Firms has been fundamentally modified. No tax is levied on a Registered Firm but a computation of the income and profits of the firm is made. The share in the profits of the firm of each individual partner is directly assessed on him along with his other income. If there be loss in the registered firm the share of loss of each partner could be set-off against his other income and where it could not be wholly set off the portion not set-off can be carried forward to the following year up to a period of six years, the first of the six years commencing from April, 1939. But such carrying forward of losses is permitted to be set-off only against the profits of the same business, profession or vocation. But an unregistered firm is assessed to tax and if loss is incurred by an unregistered firm it could only be set-off against other income if any of the

firm itself and not against the income, profits and gains of any of the partners of the firm. But if the unregistered firm is treated as a registered firm by the Officer of his own motion in circumstances set out below the benefits accruing to partners of a registered firm equally apply to the partners of the unregistered firm. Another new feature introduced in regard to an unregistered firm is that if the aggregate amount of tax including super-tax payable by the partners if assessed in the manner laid down for registered firm would be greater than the total tax payable by the firm if assessed as an unregistered firm the Officer is empowered to place the unregistered firm in the position of a registered firm. In other words if the partners of an unregistered firm would pay less tax than if the firm had been treated as such registered firm, the Officer can of his own motion act as if the firm got itself registered.

VIII. Assessment of Insurance Companies

The method of assessment now adopted has been changed which gives considerable relief to the companies. Hitherto an Insurance Company was assessed on the surplus between the assets and the annual valuation of liabilities without taking into consideration the sum re-distributed among the policy holders in the shape of bonus.

Under the Amending Act, the Department has two methods of computation to choose from, either the income on investments less expenses, or the alternative basis of the surplus as hitherto, allowing for a portion of the bonus paid to the policy holders which is really to a certain extent their own premiums collected in excess of what was needed as premium repaid to them. What was not wholly income was being taxed hitherto by adopting the method based on the actuarial surplus. But this has been remedied now by adopting a more accurate method of computation either on the basis of actuarial surplus or the basis of income less expenses.

IX. Carrying forward losses

Another of the important changes effected in the present Bill is that an assessee is permitted to carry forward the losses incurred by him in one business and have it set off against his income from the same business in the succeeding years up to a period of six years. But during the transition stage, such carrying forward is restricted. The losses incurred in the

account years 1938-39 to 1942-43 can be so carried forward only to one, two, three, four and five years respectively. This carrying forward of losses is apart from the other provision by which a loss incurred by a person in any year under any head can be set off against his income, profits and gains under the other heads in the same year. But the carrying forward of loss for setting off can only be against the subsequent income from the same business. If a business which has suffered loss is discontinued, such loss cannot be set-off in the succeeding years since that business no longer exists to yield income and such loss would become a capital loss. Such carrying forward is also not permitted if there is a change in the constitution of a firm or if a person is succeeded by another person except by way of inheritance as the object is to confer the privilege to the particular persons incurring the loss. A person who is a partner in a registered firm can have his share of loss incurred in a year set-off against his other income in the same year and can also carry forward the loss or the balance of loss and set it off against his share of income from the same business in the subsequent years. Where a person is a partner in an unregistered firm and the unregistered firm sustains a loss in any year, his share cannot be set-off against his other income even in the same year. The loss can be set-off only against the profits and gains of the unregistered firm in the succeeding years. Where an unregistered firm is treated and assessed by the Income-tax Officer as a registered firm, then the provisions in respect of a registered firm also apply to such a firm.

X. Depreciation Allowance on Buildings, Machinery and Plant

The present method of granting allowances for depreciation is the straight method of allowing particular percentages on the original cost till the original cost is exhausted. In modification of the present straight method, the written down method, that is allowance on the basis of the written down value of such machinery, etc., each year has been introduced. The written down value has to be arrived at or calculated every year. Where the assets are acquired or purchased in the year of account, the written down value will be the actual price paid by the assessee for such machinery or plant. Where the assets are acquired before the account year but after the commencement

of the Amendment Act, the written down value could be the actual price paid by the assessee for such plant or machinery less all depreciation allowance to the assessee for every year after purchase till the account year on such plant or machinery. Where the assets have been acquired or purchased before the commencement of the Amendment Act, the written down value will be the actual cost of such machinery or plant less for each financial year since acquisition the amount of depreciation applicable to the assets at the rates in force for each such year since 1st April, 1922, and at the rates in force on 1st April, 1922, for each such year prior to that date.

Allowance on the basis of the written down value each year necessitated special income-tax treatment of such assets involving the maintenance of a new set of books for all machinery, etc., for purposes of income-tax, so as to display the wear and tear attributed to each unit in order. This will facilitate the claim for obsolescence and will avoid difficulties though it involves time and trouble to assessees who have to claim depreciation. Valuation of such assets by deducting depreciation for domestic or commercial purposes and the keeping of reserves, etc., has necessarily to be on different principles.

XI. Allowance for Life Insurance Premia

Hitherto relief was given from the tax payable on the income of any person in respect of premiums paid for insurance on his own life or on the life of his wife or for any deferred annuity on his or his wife's life but the relief was subject to the restriction that the total amount of premiums on which relief is given is not to exceed 1/6 of the total income of the assessee.

Under the Amending Act while retaining the limit of 1/6 the maximum is fixed at Rs. 6,000 in the case of an individual assessee and at Rs. 12,000 in the aggregate for a joint Hindu family. This provision prevents richer assessees from claiming sums in excess of Rs. 6,000 or Rs. 12,000 as the case may be. Another change introduced in the Amending Act is that the wife in her assessment is enabled to claim relief for the premium paid by her on the life of her husband. It may be remembered in this connection that in England the life assurance allowance is granted only if the insurance, etc., is with a company legally established in the United Kingdom or British Possessions

or with any company lawfully carrying on business in the United Kingdom. No such restriction is introduced in the Indian enactment.

XII. Deductions of Tax at source

The Revenue employs the system of deducting tax at source for facility, certainty and early collection. This system was hitherto adopted in respect of (*i*) Income-tax on Salaries (S. 7), (*ii*) Income-tax on Interest on Securities (S. 8), (*iii*) both Income-tax and super-tax on interest (not being interest on securities) paid to a non-resident under the circumstances stated in S. 18 (3-A) and (3-B), (*iv*) Super-tax on dividends paid to a non-resident S. 18 (3-C) and (3-D), and (*v*) payment of accumulations in recognised Provident Fund (58-H).

There was no provision for deducting super-tax in respect of salaries or any tax on salaries or interest other than interest on securities paid to non-residents and these have now been remedied by amendments to S. 18.

Sub-section (2) of S. 18 has been amended so as to provide for deduction at source of super-tax also on "salaries" and not merely income-tax as hithertofore, and the rate at which deduction has to be made is the average of the rates applicable to the estimated total income of the assessee under the head "Salaries". The new sub-section (2-B) directs that if any salary is paid to a person not resident in British India, income-tax at the maximum rate and super-tax at the rates applicable to the estimated income should be deducted.

The new sub-S. 3-A provides that any person paying to a non-resident any interest not being interest on securities or any other sum chargeable under the Act, shall deduct income-tax thereon at the maximum rate unless he himself is liable to pay tax thereon as agent.

Consequential amendments are also made in the section.

Sub-S. (5) has been amended to include income-tax on a dividend as a sum for which credit is to be given to a shareholder in his assessment.

This amendment puts dividends on the same footing as securities and credit for the appropriate amount of tax on it will be given in the shareholder's assessment.

As a corollary, by a new S. 49-B, payment of income-tax by a company is deemed payment by a shareholder on so much of the dividend as the amount of income on which the company has paid income-tax bears to the whole income of the company.

In case of failure by a Principal Officer of a company to deduct tax either on account of the order of the Income-tax Officer or because the dividends paid exceed the maximum not chargeable to tax as provided for respectively in sub-S. 3-D and sub-S. 3-E of S. 18, both the Principal Officer of the company and the company are made liable for the tax.

By Chapter IX-B special provisions are made in regard to certain classes of superannuation funds and the new S. 58-S (2) provides that the Trustees of the superannuation fund should deduct income and super-tax at the average rate of tax during the preceding three years in cases where contributions are repaid to an employee during his life time but not at or in connection with the termination of his employment. This does not apply to persons whose employment was carried on abroad.

XIII. Making of Additional Assessments and Reopening of Assessments

Hitherto the Income-tax Officer could assess only for one previous year on the ground of escape of assessment either wholly or partially. This power should be exercised within one year from the end of the year in which the income should be taxed. Under the Amending Act, the Income-tax Officer can go back further and reopen a completed assessment or make fresh assessment where no assessment had been made up to a period of four years where there is a *bona fide* error on assessee's part in not returning the income in full. But where the Income-tax Officer has reason to believe that the under-assessment was due to the fact that the assessee concealed particulars of his income or deliberately furnished inaccurate particulars, such power to reopen can be exercised for a period of eight years. A difference is thus made between a genuine mistake and deliberate mistake to defraud revenue. This power can also be invoked in a case where excessive relief has been granted. But in practice, this difference will not be made in a majority of cases as every assessee must be aware of his income and know the law and must take the consequence of not disclosing all his income. Thus every taxpayer coming into the net is provided for

and power is taken to deal with obstruction and dishonesty. An exception has been made in the case of a person who has been assessed as the agent of a non-resident under S. 43 where a fresh assessment could be made only within one year from the end of that year. Lest the Act should be deemed retrospective, provision is also made that in the case of assessments prior to the commencement of the Amendment Act, such back assessment can be made only within one year from the end of that year. What is required in all these cases is that action should be taken under S. 34 within the periods mentioned above and the fresh assessments may be completed later. To avoid assessments or re-assessments being kept pending for a long number of years it is stated that in all cases assessments or re-assessments should be completed and orders passed ordinarily within four years. But where the provisions of cl. (*c*) of sub-S. (1) of the penalty section 28 applies, the same should be done within eight years. Since it is the Officer who is finally to decide whether the under-assessment was due to *bona fide* cause or due to the fraud of the assessee, every person should be prepared to submit returns, explain transactions and produce his accounts and evidence in support thereof up to a period of nine years from the date on which the transactions took place. This provision necessitates the preservation of all accounts, documents and correspondence and evidence for nearly a decade. In such back assessments after a long lapse of years, it is doubtful whether an assessee would be able to explain his accounts in the same manner in which he might be able to do it if he were called upon to do so earlier. By the operation of this section, if a fresh assessment is made it could be only to the disadvantage of the assessee as the assessee is not given an opportunity to show that he is over-assessed and have the assessed income reduced.

In cases of succession, the successor cannot be assessed to such tax except for one year (S. 26). It is not clear whether this provision could be applied (*a*) to the case of a Hindu undivided family which becomes divided and ceases to be a joint family and (*b*) to the case of a company which is dissolved and the Officer finds that its income three or four years previously has been under-assessed.

In the case of assessees who are not alive and who escaped assessment, no such limitation of one year is made. The

law has been amended so as to render legal representatives of an estate liable in respect of income, profits and gains which ought to have been returned and which were not returned for the period of four years or eight years as stated above. Thus the estate is made liable to all penalties for fraud or negligence as the Act would have imposed upon the deceased taxpayer, if he had still been alive. In the past one assumed that back assessment cases concerned only the living and not the dead, and when the taxpayer died, liability to penalties for negligent or fraudulent returns died with him. With death duties on the horizon and imminent, on an investigation into the estate of deceased for death duty purposes, information leading to proceedings for penalties and back assessment can easily reach the Income-tax Officials. Figures may raise a *prima facie* case of fraud and the only person who could refute the implication may be the deceased. Fraud is both a state of mind and a question of fact and there will be great difficulty in explaining matters and the deceased if alive might have been able to give a perfectly correct explanation of what had taken place and to show that penalty provisions could not be applied. The object of these provisions is to raise the morale of the people.

It may be here pointed out that the English Statute (Section 29 of Finance Act, 1923) while extending the period of back assessments from 3 to 6 years, specifically provided that in the case of raising fresh or additional assessments on the estate of deceased persons, the three years rule shall be applicable.

It is significant to note that there is no complementary provision placing the Taxpayer and the Revenue on an equal footing, though a taxpayer may make an honest mistake and no retrospective right is conferred on him.

XIV. Assessment, Appeals and Administrative Machinery

Under the Act before the amendment, in cases where the Principal Officer of a company or any other person who is an assessee made defaults and failed to make a return or to comply with all the terms of a notice issued by the Officer requiring him to produce accounts or documents, the Income-tax Officer had power to make an assessment to the best of his judgment and also to cancel the registration of any firm. No appeal was provided against such estimated assessment and the only remedy which the assessee

had was to apply to the Income-tax Officer himself under S. 27 and to get the assessment set aside on satisfying the Income-tax Officer that he was prevented by sufficient cause from making the return or complying with the terms of the notice issued. This led to a great hardship and assessees were unable to fight the assessment on its merits. This has now been remedied by making such assessments also appealable in the regular manner similar to an appeal against an *ex parte* decree.

In effect it may be said that undei the Amended Act all orders passed by the Income-tax Officer affecting the assessee are appealable and this is definitely of great importance. If however the appeal is against an order levying penalty for non-payment of the tax within the time allowed, the appeal will be entertained only if the tax has been paid.

The duties of the Assistant Commissioner have been separated and two categories of Assistant Commissioners have now been appointed, namely, Inspecting Assistant Commissioners and Appellate Assistant Commissioners. The former have nothing to do with the hearing of the appeals against orders of the Income-tax Officer which is solely entrusted to Appellate Assistant Commissioner. Though both categories of Assistant Commissioners are under the control and subject to the jurisdiction of the Central Board of Revenue, the Central Board of Revenue cannot interfere or give any instructions or orders so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate jurisdiction. This division of functions is a salutary change. As the Appellate Assistant Commissioner performs more or less judicial functions it is now provided that the Income-tax Officer has the right to be represented before him at the hearing of an appeal against an order of the Income-tax Officer.

By far the most important change introduced by the Amending Act is the provision made for the introduction of a further appellate authority of an independent nature for the hearing of appeals from decisions of the Appellate Assistant Commissioners.

It is provided in Part II of the Schedule that the Central Government shall appoint an Appellate Tribunal consisting of not more than 10 persons made up of an equal number of judicial members and accountant members. The normal qualifi-

cation for a judicial member is that of a District Judge and the qualification for an Accountant Member is that of an Auditor who has practised for not less than six years. But the Central Government may appoint as an Accountant Member though not possessing the qualifications aforesaid a person who, by his other qualifications and adequate experience, is found suitable for appointment to the Tribunal.

Not less than two members are necessary to form a Bench and the number of Judicial or Accountant Members in a Bench should not exceed each other by more than one. The decision of the majority governs the case and in the case of a tie the matter is to be referred to the President of the Tribunal on stated points who refers it for the opinion of other member or members and the final decision is according to the majority opinion of all members who heard it. In order that both the department and the assessee may have sufficient time and opportunity to acquaint themselves and be prepared for the change, the Appellate Tribunal is not to take effect immediately but is to come into effect not later than two years from the commencement of the Amending Act. It is also provided that an assessee may appeal, or the Commissioner if he is not satisfied with the Appellate Assistant Commissioner's order may direct the Income-tax Officer to appeal, to the Appellate Tribunal against the order of the Appellate Assistant Commissioner under Ss. 28 or 31 and the appeal should be filed within 60 days of service of notice of such order. The Appellate Tribunal is to decide the appeal after giving notice to both parties and its orders are final except in cases to which S. 66 applies (namely statement of case by the Appellate Tribunal to the High Court).

The present Ss. 32 and 33 dealing with appeals to the Commissioner against the order of the Assistant Commissioner and power of revision will not operate when the Appellate Tribunal as abovesaid is constituted. The Appellate Tribunal is given the power to regulate its own procedure to rectify any mistakes and to take evidence on oath, to call for evidence, production of documents, etc.

S. 66 as it now stands is amended and it is provided that within 60 days from the service of the notice of order by the Appellate Tribunal, the Commissioner or the assessee as the case may be, may file an application (accompanied in the case of the assessee by a fee of Rs. 100) requiring the Tribunal to refer to

the High Court any question of law arising out of the order of the Tribunal and the Appellate Tribunal is directed to draw up a statement of the case and refer it to the High Court but where the Tribunal refuses to state a case on the ground that no question of law arises, the aggrieved party is given the liberty to move the High Court within 6 months of the date of refusal to direct the Tribunal to state a case and refer it. If the Appellate Tribunal refuses to state a case on the ground that the application filed is out of time then also the aggrieved party has got the right to move the High Court within 60 days.

It will therefore be seen that two appellate authorities are provided for and there can be two appeals as of right in each case. The Appellate Tribunals are hereafter the ultimate judges of fact and not the Assistant Commissioner or the Commissioner and so far as a reference to the High Court is concerned both the Department and the assessee are placed on the same footing.

The appointment of an appellate tribunal can be said to be a most important provision in the Amending Act in favour of the assessee and goes a long way to remove the grievances and complaints made by the assessees hitherto that the scales had not been held even as between the taxpayer and the tax gatherer.

Under S. 5 (2) of the Act provision has been made to enable the Government of India to appoint not more than three Commissioners of Income-tax without reference to area to work directly under the Central Board of Revenue.

The idea underlying this is to create a centralised or special branch to deal with special branches of work or matters of special difficulty or importance, *e.g.*, companies, insurance, penalty, fraud, etc. and with a view to bring under one head assessment of persons who are assessed in different areas.

XV. Amounts hitherto not assessable now made assessable

This has been done by enlarging the area of taxation as in S. 4 or by extending the definition of income by deeming certain sums as income which were hitherto either held as capital sums or income not liable to tax.

Sums mentioned in the following sections which have been dealt with in detail under different heads are now taxable

K

as income. A reference is invited to the following sections: 2 (6) A, 4 (1) Explanation (2), 4 (1) Explanation (3), 4 (2), 16 (2), 16 (3), 42, 44-D, 44-E, 44-F.

Under S. 2, (6-C), (i) a profit received in lieu of salary; (ii) sums got in excess of written down value when plant or machinery is sold; (iii) mutual assurance profits; (iv) under cl. (xi) of S. 10 (2) the excess sum received over a sum written off as bad debt are deemed income under the new Act.

Explanation (3) to S. 4 (1) says a dividend paid without British India shall be deemed to be income accruing or arising in British India to the extent to which it has been paid out of profits subject to income-tax in British India. By an addition to S. 42 of the Act, interest from money lent abroad by a non-resident and brought into British India in cash or in kind (by the borrower) shall be deemed to be income accruing or arising within British India assessable either on the non-resident or his agent.

S. 60 of the present Act gave power to the Governor-General to exempt particular classes of income from tax under which many items of income have been exempted by notification. This section has been modified in such a way that while taking away the scope of exercising the power of exemption hereafter, power is retained only for the purpose of revoking or modifying exemptions already given.

Under the present Act the income from agricultural land in a Native State in India paying land revenue to the Indian State is exempt. But such agricultural income would be assessable under the Amendment Act. The land tax may be payable to the Native State Government and Income-tax to British Indian Government and there will be no relief against double tax in respect of such taxation. Income from agricultural lands in Burma will be assessable in British India on the accrual basis.

THE

MADRAS LAW JOURNAL.

I]. APRIL [1939

THE GOLDEN JUBILEE OF THE MADRAS ADVOCATES' ASSOCIATION

FIFTY YEARS OF EVENTFUL LIFE.*

BY

SIR P. S. SIVASWAMI AIYAR, K.C.I.E.

The Madras Advocates' Association is but the continuation of the Madras High Court Vakils' Association which was started in the eighties of the last century, though now carried on under a different and more comprehensive name. The completion of fifty years of existence in the life of an institution is an event which deserves to be celebrated, especially in this country of short-lived associations, and must be a matter of rejoicing to the members of the Association. Though it is twenty-seven years since I left the Bar and I have been out of touch with the members of the profession and have not entered the precincts of the High Court more than four or five times during this period, I have not lost my interest in the welfare of the Association. Advancing years and the incidental infirmities have made me very chary of undertaking any onerous tasks. But I was reminded by my friend Mr. V. V. Srinivasa Aiyangar that I was the seniormost surviving member of the Madras High Court Vakils' Association, and he pressed upon me the propriety of my presiding at this function. As I could not deny

* The Presidential address of Sir P. S. Sivaswami Aiyar on the occasion of the celebration of the Golden Jubilee of the Madras Advocates' Association on 19th February, 1939.

the soft impeachment of my seniority, I had to overcome my reluctance and accept the penalties of my standing.

The High Court Vakils' Association, which is now functioning under the name of the Advocates' Association, was started in April, 1889, though it was incorporated under the Literary and Scientific Societies Registration Act only in March, 1908. It must not, however, be supposed that the Vakils had not formed an association before 1889. To the best of my recollection, there was a Vakils' Association in existence at the time of my enrolment in April, 1885, and Mr. S. Gopalachariar was its Secretary. When he left Madras on his appointment as a Sub-Judge, Mr. K. P. Sankara Menon, who subsequently became a Judge of the High Court of Travancore, was appointed as Secretary. For some reason or other the Association ceased to function and became defunct. In March, 1889, we wished to revive and reorganise the Vakils' Association for the purpose of mutual co-operation and better safeguarding of the interests of the profession. The objects of the Association were declared to be to maintain a high standard of professional conduct, to protect and promote the interests of Vakils, to make representations to the authorities on matters affecting the profession and to form and maintain a library. My friend the late Mr. V. Krishnaswami Aiyar was the first Secretary of the new Association, and he continued to be the Secretary till 1901. The organisation and successful working of the Association was in large measure due to the personality and boundless energy of Mr. Krishnaswami Aiyar.

One of the first fruits of the activities of the Association was the privilege accorded to Vakils to wear gowns. This was the first step taken to remove our grievance that though the Vakils were in no way inferior in learning or ability to the barristers who were regarded as the senior branch of the profession, we were treated as occupying an inferior status. The representations that we made from time to time met with a sympathetic response from the Chief Justice, Sir Arthur Collins. The formation of a library for the Association, which has now expanded to respectable proportions, the total number of volumes being over 30,000, was the result of the member's subscriptions and donations, and helped to draw the members together closer and impart a sense of proprietary interest in the properties of

the Association and an element of permanence to the Association. Towards the end of 1889 we succeeded in getting from the Chief Justice two rooms in the Court house for the accommodation of the Association and its library. When the Association was founded in 1889, the High Court was located in the block of buildings opposite the harbour in which the Income-tax Office, the Collector's Office and a number of other miscellaneous offices are now housed. The two rooms assigned to us were on the ground floor near the northern end; and of the two, the room facing the sea had to be vacated during the trial of sessions cases for the accommodation of jurors. There was no room in the old High Court for Vakils' offices and we had our offices in rented buildings in the streets and lanes in the purlieus of the High Court. When the High Court was shifted to the palatial buildings which now adorn the Esplanade and the sea front, the Government were good enough to construct chambers for the Vakils within the precincts of the High Court.

In my earlier remarks I referred to the grievance of Vakils with regard to the status of inferiority assigned to them, compared with the barristers' branch of the profession. This grievance was very keenly felt, though it was of a sentimental character. It has now been practically removed by the Bar Councils Act which has brought about the unification of the different branches of the profession. In passing I may mention that in 1895 a proposal was made that Vakils of a certain standing might be allowed by the High Court to be enrolled as Advocates. This proposal was rejected by us, and in my opinion rightly, on the ground that it would relegate the large majority of Vakils to a distinctly lower category and would militate against our attempts to win a position of equality with the Advocates' branch of the profession for the whole body of Vakils.

In respect of substantial rights and privileges the position of the Vakils in Madras has always been one of decided superiority to that of the Vakils in the High Courts of Calcutta and Bombay. When the High Court of Madras was constituted in supersession of the old supreme Court and the Sudder Court, rules were framed by the High Court for the admission of Advocates, Vakils and Attorneys, and under these rules Vakils were entitled to plead and act on the original and appellate

sides and on the criminal side of the High Court. The right of Vakils to appear in appeals from the decisions of the Insolvency Commissioner to the High Court had been recognised, but their right to appear before the Insolvency Commissioner was not recognised for many years, until after it was raised and thrashed out in the sixth volume of the Madras Law Journal.

The qualifications laid down for admission as a Vakil in the first set of rules framed by the High Court were the attainment of the B.L. degree and, in addition, (*a*) a certificate of having subsequently studied for six months with an Advocate of the High Court or a Vakil entitled as such to practise on both the original and appellate sides and for a further period of six months in the office of an Attorney, or (*b*) a certificate of having studied for twelve months either with an Advocate or a Vakil entitled as such to practise as aforesaid or in the office of an Attorney, or (*c*) a certificate signed by the Registrars on the original and appellate sides of regular attendance upon the sittings of the Court in accordance with the rules prescribed in that behalf for two years subsequently to the attainment of the degree. An alternative qualification was the production of a certificate of having kept six terms at one of the inns of Court in London and of regular attendance on the course of law lectures while keeping such terms, as also a certificate of having passed one of the examinations provided for students, together with a certificate of subsequent study for nine months with an Advocate of the High Court at Madras or a Vakil entitled as such to practise on both the original and appellate sides or in the office of an Attorney. A certificate of good character and conduct signed by the Advocate, Vakil or Attorney was an essential requirement in all the aforesaid cases.

Except in the matter of precedence and pre-audience, Vakils of our High Court were on a footing of equality with Advocates who were then regarded as the senior branch of the profession. There was no question as to the eligibility of Vakils for any of the law offices of the High Court, but as a matter of practice, all the law offices were treated as a close preserve for European barristers. The first time that a High Court Vakil was appointed as Government Pleader in the High Court was when the late Sir S. Subrahmanya Aiyar was appointed to act as Government Pleader during the absence of Mr.

E.B. Powell, the permanent incumbent. So far as the Advocate-Generalship was concerned, there was a delusion, bred by the use of the term 'Advocate' as part of the designation of the office, that Vakils were not eligible for the office. This belief was exploded by the appointment of Sir V. Bashyam Aiyangar as officiating Advocate-General in 1897. The credit of the discovery of the eligibility of Vakils was due to Sir Bhashyam Aiyangar, and the merit of the courage to act upon this discovery belonged to Sir Arthur Havelock who was one of the most liberal-minded Governors of this Presidency. Various protests against this appointment were made by the Barristers who contested the eligibility of the Vakils, but they failed as they deserved. By an irony of fate Sir Bhashyam Aiyangar was not appointed to the office when a permanent vacancy arose, and on the next two occasions barristers were appointed by the Secretary of State. But since 1907 the office has been always held by a Vakil, except once. It is a matter for satisfaction that except the Government Solicitorship, the Public Prosecutorship and the Chief Law Reportership, all the law offices are now held by Vakils.

After the passing of the Bar Councils Act and the unification of the different branches of the profession, there were no invidious distinctions between Vakils and Barristers with regard to their eligibility to any law office. Doubts as to their eligibility for the Chief Justiceship have been removed by the Government of India Act of 1935.

The higher status of the Vakils in the legal profession as compared with the Vakils in Bombay and Calcutta is due to the broad-minded spirit of the rules framed by the High Court of Madras when it was formed in 1862. The improvement in the status of the Vakils is due to the abilities and attainments of the members of this branch of the profession from the earliest times, not a few of whom rose to eminence. No Vakils contributed more to raise the esteem and prestige of the Vakil Bar than Sir V. Bashyam Aiyangar, the prince of lawyers, and Sir S. Subrahmanya Aiyar his illustrious rival.

A few facts about the High Court as it was first constituted may be of interest to you. The High Court consisted only of five judges including the Chief Justice. The number of judges was raised by one in 1896, by one more in 1907 and

another was added in 1908. It has since been raised from time to time until it now stands at fourteen including the Chief Justice, being only one less than the maximum fixed by the Government of India Act of 1935.

The first volume of the Madras High Court Reports contains some interesting information about the number of cases decided by the High Court during the period of 16½ months which elapsed from the opening of the High Court to the 31st of December, 1863. On the original side 179 suits and 174 sessions cases were disposed of. On the appellate side 112 regular appeals, now called first appeals, and 1201 special appeals, now called second appeals, were disposed of. The number of regular appeals pending at the end of the period was 63, and of special appeals, 239. I omit any reference to the figures relating to civil and criminal petitions and other miscellaneous matters. In the year 1937, the number of original suits disposed of was 385, of first appeals 826, of second appeals 1049, of civil miscellaneous appeals 409, and of original side appeals 48. Whether any and what inferences can be drawn from these statistics as to the increase or decrease in the volume of litigation, the requisite strength of the High Court and the prospects of the legal profession are matters which must be left for investigation by those who have more curiosity and patience than I possess. I express no opinion on the question whether the decrease in the volume of litigation is due to causes affording room for satisfaction to the public or the reverse and whether they are of temporary or permanent operation. I must refrain from further discussion of a delicate question which may possibly have a repercussion on the happy harmony that prevails between the Bench and the Bar.

The rights and privileges of the Vakil branch of the profession in Calcutta and Bombay compare unfavourably with those of the Vakils in Madras. Though there have been Vakils' Associations in Calcutta and Bombay, I have not been able to obtain any account of their history and activities. As regards Bombay, I learn that a Vakils' Association was formed in January, 1864, with the object of raising and maintaining the professional status of its members, diffusing professional information and promoting amelioration of the laws affecting the constitution of the Courts and forensic practice. Mr. Dhirajlal

Mathuradas, Rao Saheb Visvanath Narayan Mandlik, Mr. Shanta Ram Narayan and Mr. Nanabhai Haridas were among the foundation members of the Association. The second and third gentlemen became Government Pleaders and the last became a High Court Judge, and their names are all well known to readers of the Bombay Law Reports. The first native of India to be appointed to the High Court of Bombay was Mr. Janardan who was a judge of the Court of Small Causes. It is curious that the terms of the congratulatory address which was given to Mr. Justice Janardan when he took his seat on the Bench were previously considered and approved at a joint meeting of the Pleaders' Association and the Vakils' Association of Western India.

It may be of interest to you to learn something of the conditions of the Vakils' profession, its opportunities, the incomes of the members at the top and the struggles of the juniors. To a large extent my information is based upon hearsay. So long as Sir V. Bashyam Aiyangar was at the Bar, he commanded the most lucrative practice, and I have been told that at the height of his practice his income did not much exceed an average of Rs. 10,000 a month. The post-war boom in prices greatly raised the fees of lawyers and I believe the peak in lawyers' incomes was reached by the late Sir K. Srinivasa Aiyangar, who told me himself that he was making Rs. 20,000 per mensem. I have heard that in England also the income of the top-most men in the Bar during the post-war years reached heights never before known in the history of the Bar. The income of Sir John Simon when he was the leader of the Bar was far higher than that of Sir Rufus Isaacs who afterwards became Lord Reading. I do not know whether the economic depression which set in ten years ago has affected the incomes of leading Advocates in Madras. So far as the juniors are concerned, it would be wrong to imagine that the juniors of the previous generations did not have to face any struggles. In one respect conditions were less unfavourable. The number of Vakils practising in Madras in former years bears no comparison with the number of those practising at the present time. The number of Vakils practising in Madras in the first year after my enrolment in 1885 was about 75. In 1889 when the Vakils' Association was formed, the number was somewhere about 100, of whom 59 were members of the Association.

According to the annual list for 1938, the total number of persons enrolled as Advocates is 3790, and the number of those practising in Madras is said to be about 1600, of whom 610 are members of the Association. *Prima facie* the number of practitioners is far in excess of the volume of litigation coming before the Courts which seems to have been steadily going down. Even so early as 1897, the Madras Law Journal complained of the overcrowding at the Bar. How much more is that complaint justified at the present time? The causes of overcrowding are well known, the principal of them being the dearth of alternative walks of life suitable for our educated young men. Another cause is the attraction held out by the large incomes made by the great leaders of the profession. Many a fond parent wishes his son to enter a profession which holds out prospects of making a fortune or at least a substantial income. Our people are great believers in luck, and a parent often asks why his son should not be lucky enough to attain the same success as Sir V. Bashyam Aiyangar or Sir S. Subrahmanya Aiyar. Probabilities do not enter into his calculation and he is not deterred by risks of failure. Too often he thinks that his son has as good qualifications as any of the men at the Bar who have risen to eminence. It is not realised that success at the Bar does not depend merely upon one's qualifications or intrinsic merits, but upon the opportunities that a man can get for the display of his abilities and attainments. Limited as such opportunities were in my time, they are obviously far more limited to-day. Unless a beginner has influential relations or connections or can get the chance of devilling to appreciative and generous leaders in the Bar, he has no means of making himself known to the client world or to the judges of the Courts. The rules of professional ethics forbid recourse to questionable practices like touting, canvassing, soliciting or advertising. You are often told that patient merit will be eventually rewarded. Is it surprising that the struggling junior regards this saying as a mere pious platitude? Merit without opportunity is destined to languish and suffer the agony of blighted hopes and a wasted life. The spectacle of hundreds of young men suffering from unemployment and without any reasonable prospect of success is positively distressing. Is it possible to hold out any message of good cheer to lift the burden of their worries and anxieties? This aspect has recently engaged the attention of eminent lawyers and judges all over India. So far as future

entrants are concerned, the most helpful suggestion is the restriction of the numbers of lawyers. How the restriction is to be brought about is a matter for earnest consideration. The result will be achieved to a large extent by the relentless operation of economic laws and the cruel principle of survival of the fittest. a principle which, in spite of its truth, involves great difficulty in framing a satisfactory definition of fitness. The number of candidates for admission to the Law College or to the Bar will necessarily decline when our young men and their parents are convinced that the profession is enormously glutted and that there are other walks of life offering comparatively better chances of remunerative employment. As regards the young men who have already joined the Bar and are struggling for their livelihood, advice has been tendered with the object of alleviating their position, in the presidential address of the Rt. Hon'ble Sir Tej Bahadur Sapru at the Allahabad Lawyers. Conference held in November last and in the presidential address of Sir M. Venkatasubba Rao at the Krishna District Lawyers' Conference held at Bezwada two months ago. The question of overcrowding at the Bar has been considered at length and various suggestions have been made which provoke thought and demand careful consideration. The extension of the B.L. course to three years would enable a more intensive and adequate study of the subjects included in the curriculum and would also have the incidental advantage of reducing the number of entrants to the Law College. Sir Tej Bahadur Sapru is in favour of instruction being provided in such branches of law as commercial law, including company law and industrial law, constitutional law, international law and conveyancing. In so far as a knowledge of these subjects will enable lawyers to specialise in particular kinds of work, such instruction would be useful and valuable. I believe it could not have been the intention of Sir Tej Bahadur Sapru to include these subjects in the list of compulsory subjects for the B.L. course. The addition of these subjects to the compulsory list would heavily overburden the course and interfere with the intensive study of the more essential subjects which now find a place in the curriculum.

I entirely agree with the suggestion made by Sir Tej Bahadur Sapru and by Sir M. Venkatasubba Rao that a voluntary division of labour may be made by our Advocates and that some of them may specialise in chamber practice, advising, con-

veyancing and drafting. But as admitted by Sir M. Venkatasubba Rao, our people have not learnt to appreciate the value of previous legal advice for the purpose of avoiding litigation. Ignorance of the desirability of consulting experts beforehand is a characteristic of our people not merely in legal matters, but also in matters like health and housing.

The suggestion made by Sir M. Venkatasubba Rao that young lawyers should settle in village parts and contribute to the work of rural reconstruction may be suitable to the lawyers who wish to spend their retirement in rural areas, but cannot possibly appeal to the budding lawyer who wishes to earn a living by the exercise of his profession. I do not believe that there is remunerative work in the way of advising and conveyancing, waiting for the lawyer in the village, and sufficient to attract him. There may be some scope for employment in larger areas like the Taluk headquarters. As pointed out by Mr. Justice Varadachariar, the result of encouraging the young lawyer to settle in villages will be that he will lose no time in discovering that his only chance of earning a subsistence would consist in fomenting litigation. While the advent of the doctor to village parts would be beneficial by promoting health, the settlement of the lawyer in a village is more likely to prove a curse than a blessing.

Another interesting suggestion is the provision of legal aid for the poor litigant to be financed by a tax on the higher legal incomes. The suggestion will have to be considered from many aspects, including the danger of encouraging the passion for litigation, the prolongation of delays in the administration of justice and the difficulties attendant upon the selection of competent lawyers without favouritism.

In the course of his remarks on unemployment in the legal profession, Sir Tej Bahadur Sapru seems inclined to recommend an increase of the judiciary to be recruited from the Bar. No increase in the number of Courts or judges could possibly provide employment for the hundreds of unemployed Advocates in the profession. But even if it could, the increase of Courts or judges will have to be decided with reference to the needs of the administration of justice and the financial resources of the country, and not from the point of view of employment for lawyers.

The problem of unemployment in the legal profession is not more acute than in the case of other professions and occupations. It is only one aspect of a problem affecting the whole country and the only solution is the opening up of other avenues of employment which must depend upon an increase in the wealth of the country by the creation of new industries and increase of production and the diversification of occupations incidental to the complex economic structure of a modern State.

In conclusion, I must thank you for the honour you have done me in inviting me to preside on this gladsome occasion in spite of the fact that I am not on the roll of Advocates. It only remains for me to offer my heartiest wishes for the long life, prestige and prosperity of the Association to which we are all proud to belong, and to express my hope that the members of the profession may exercise a salutary influence on public affairs and contribute to the orderly evolution of a strong and united nation and the all-round progress of this great country.

SUMMARY OF ENGLISH CASES.

MARQUESS OF ZETLAND *v.* DRIVER, (1939) 1 Ch. 1.

Sale of land—Restrictive covenants—"Vendee not to do or permit anything to be done which in the opinion of the vendor may be a public or private nuisance or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood—Validity of the covenant—Form of injunction.

A clause in a conveyance of land provided that "the purchaser to the intent and so as to bind as far as practicable the property conveyed, into whosesoever hands the same may come, and to benefit and protect the vendor's land remaining unsold or as shall be sold by the vendor or his successors in title with the express benefit of the covenant, covenants with the vendor that the purchaser will at all times observe, perform and keep the said stipulations contained in the second schedule. The second schedule by clause (*d*) provided *inter alia* that no act or thing shall be done or permitted thereon which in the opinion of the vendor may be a public or a private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood." The vendee sold the premises to the first defendant with notice of the restrictive covenants. The first defendant with the second defendant started the sale of fried fish at the premises for consumption off the premises. The successor in title of

the vendor, on complaints received, formed the opinion that such sale was detrimental to the amenities of the neighbourhood and to his own property. He therefore applied for an injunction. Bennet, J. (1937 Ch. 651) dismissed the action on the ground (1) that the plaintiff cannot sue as he was not the original covenantee and (2) the plaintiff had no right to enforce the covenant as he was not the owner of any land to which the benefit of the covenant had been effectually annexed. On appeal,

Held, in forming his opinion the plaintiff was in no sense performing a judicial or quasi-judicial function and was under no obligation to give the respondents an opportunity of being heard. The plaintiff is entitled to the benefit of the covenant and *prima facie* entitled to enforce it against the defendant who took their land with notice of the restrictions. The injunction must be limited to fried fish, and the injunction must be confined to so long as the plaintiff or other successor in title of the original vendor retains unsold any part of the property for the benefit of which the covenant was imposed.

In re NICHOLSON'S SETTLEMENT: MOLONY *v*. NICHOLSON. (1939) 1 Ch. 11.

Power of appointment—Settlement—Power to appoint in favour of one—Prior attempt with trustees of settlement to secure a benefit for appointor—Failure of—Later exercise of power in favour of the object of the power—Motive to defeat the trustees —If exercise of power fraud on the power.

A woman had a power of appointment which she could exercise in favour of any husband that may survive her for his life or for any less period and upon such conditions and with such restrictions as she shall think fit. In 1933 when she was over 80 years of age she wanted to make a provision for certain relations with whom she was living and she therefore negotiated with her relations and trustees of the settlement that if she should release her power of appointment, they should give her half of the capital to enable her to dispose of it as she pleased. Since they did not agree, she married one N. Q. in 1934 and by a deed of later date she exercised the power of appointment in favour of that husband. She died in 1936. It was contended that the appointment was bad as a fraud on the power of appointment.

Farwell, J., held in (1938) 1 Ch. 308, the question of a fraud on a power of appointment where there is one object and one object only of the power, differs widely from the question of a fraud on a power by which the fund can be given to one or more

of several objects. Where there is one object only of the power it is impossible to establish a fraud unless there is evidence of some arrangement between the appointor and the appointee, not necessarily a legal bargain, but some arrangement under which the appointee is to give effect to the purpose of the appointor to benefit some one other than himself. The Court of Appeal affirmed the judgment.

In re MAVILLE HOSE, LTD., (1939) 1 Ch. 32.

Companies—Companies Act, 1929, S. 214—Practice—Discovery—Liquidator asking for order against a director for examination as witness and for discovery and production of certain documents—Premature and oppressive—Discretion of Court—Procedure where order is improper.

In a voluntary liquidation, the liquidator obtained an *ex parte* order from the Registrar against a director to attend in chambers to be examined on behalf of the liquidator under S. 214 of the Companies Act and also requiring him to produce certain documents, books, papers, etc. (detailed in a schedule) in his custody or power in any wise relating to the company. The director applied for the discharge of the order for production of documents, etc., on the ground (1) that the documents etc., were not in his custody or power, and (2) that the order is oppressive and as such ought not to be made in the discretionary jurisdiction of the Court. The liquidator contended that the proper procedure was to appear before the Registrar and refuse to produce the documents and that the order has been made propeily in the exercise of the Court's jurisdiction.

Held, if an order to produce documents etc., is made the proper course is to ask that it should be discharged so far as it is claimed that it is an improper order.

The order for production of documents is oppressive in the special circumstances of the case. It is very important in exercising a jurisdiction under S. 214 which is in any case an inquisitorial jurisdiction to be careful not to allow the section to be oppressive as between the company on the one hand and a third party on the other hand against whom it is contemplated that hostile action may be taken.

In re OCEANIC STEAM NAVIGATION COMPANY, LTD., (1939) 1 Ch. 41.

Company—Companies Act, Ss. 153 and 154—Application for sanction of scheme—Arrangement in excess of the powers defined by memorandum—Competence of company to enter into—If Court can sanction.

A company in insolvent circumstances applied to the Court under Ss. 153 and 154 of the Companies Act, 1929, for an order sanctioning an arrangement which was approved by the creditors but opposed by the shareholders. The scheme involved the transfer of the whole of the assets and undertaking of the company to a new company to be formed for the purpose. The old company had no power as a going concern to sell and dispose of its whole undertaking.

Held, if there is no power in the memorandum to dispose of its undertaking, Courts should not under S. 153 sanction a sale as part of a scheme, though the scheme is quite proper.

In re A DEBTOR: *Ex parte* THE DEBTOR *v.* THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER, (1939) 1 Ch. 145.

Bankruptcy Act, S. 5, sub-S. 3—Petitioning creditor privy to appointment of trustees under deed of assignment—Validity of petition based on the deed of assignment.

The petitioning creditors who were privy to the proceedings appointing trustees under deed of assignment should not take advantage of a situation in the creation of which they were themselves acquiescing parties. The case is one in which under S. 5, sub-S. 3 of the Bankruptcy Act, 1914, no receiving order ought to be made.

In re A DEBTOR, (1939) 1 Ch. 225.

Sale of Goods Act, S. 4, sub-Ss. 1, 3 and S. 35—Oral contract for sale of goods of over £10 value—If enforceable.

Appellant was a builder and the respondents were manufacturers and suppliers of certain kitchen fitments. On 3rd March, 1938, appellant's brother and authorised agent orally ordered 5 kitchen fitments. Respondent orally accepted the order. Appellant recorded the order and the price of goods in his purchase day book. On 18th March, 1938, the goods were taken by the respondent to appellant's premises and delivered to an employee of the appellant. The goods remained in appellant's premises till 12th April, 1938. On 29th March, 1938, the appellant executed a deed of assignment for the benefit of his creditors. On 12th April, 1938, respondents presented a petition for a receiving order. The total indebtedness of the appellant to the respondent excluding the value of these 5 kitchen fitments was under £50. The question was whether there was an enforceable contract with regard to the 5 kitchen fitments.

Held, there was an enforceable contract and there can be a valid receiving order on the petition.

NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LIMITED, (1939) 1 K.B. 70.

Master and servant—Company—Contract of service with—Transfer of rights, powers and liabilities to another company under S. 154, sub-Ss. 1 and 4 of the Companies Act, 1929—If includes contract of personal service.

A company with whom the appellant had a subsisting contract of service, with the sanction and under the orders of Court under S. 154 of the Companies Act, 1929, transferred their "property rights and powers of every description" to the respondent company. The appellant continued to serve and receive wages for four months after the transfer believing himself to be working at the old company under the original contract of service. On October 7, 1937, the appellant absented himself without cause and the respondents obtained an order from the justices for 15*s.* damages and 10s. costs against the appellant. The appellant contended that he had no contractual relationship with the respondent and the transfer under S. 154 cannot include rights under a contract of personal service. On a case stated by the justices,

Held, the words of S. 154 of the Companies Act, 1929, are wide enough to include rights arising out of contracts of service with servants and therefore a contract of service was in existence between the appellant and respondents.

BARNES *v.* HELY HUTCHINSON, (1939) 1 K.B. 93.

Income-tax Act (1918), Sch. D, Case V—Shareholder (resident in England) of a foreign company not liable to British income-tax—Foreign company's income derived in part from dividends on shares in British companies tax on which deducted—Relief from double taxation.

The respondent owned certain 8 per cent. cumulative preference shares in an Indian company whose issued capital comprised both preference and ordinary shares. The company owned a large number of ordinary shares in two British companies the whole of whose profits were assessed to United Kingdom income-tax. The Indian company received during the year ending April 5, 1931, dividends upon its shares in the British companies. The profits of the British companies had borne United Kingdom income-tax which was deducted from the dividends. On June 22, 1931, the Indian company paid the dividend on its preference shares by rupee warrants without deduction of tax. The full amount of dividend was included in the aasessment of the respondent. The

respondent claimed, that, as part of the dividend (44·12 per cent.) was paid out of the taxed dividends received by the Indian company from the British companies it should not again be subjected to United Kingdom income-tax in his hands.

Held [affirming the decision of Lawrence, J., in (1938) 1 K.B. 469], the appellant is entitled to relief from double taxation for the portion of the dividend representing taxed profit of the British companies.

Gilbertson v. *Fergusson*, (1881) 7 Q.B.D. 562, applied.

MYERS *v.* ROTHFIELD, (1939) 1 K.B. 109.

Solicitor—Delivering a defence with knowledge that it was not likely to succeed—Causing to be filed inadequate affidavits of documents which solicitor could not help knowing were false—If misconduct calling for exercise of punitive powers of the Court—If solicitor to be made to pay costs personally.

The plaintiff in an action against the defendants for defrauding her of moneys and shares by making her invest in a worthless company obtained a judgment for £9,400 16*s*. 1*d*. It appearing unlikely that the plaintiff would be able to recover either the judgment amount or costs from the defendants, the plaintiff by her counsel asked that the solicitors for the defendants should be ordered to pay the plaintiff the costs of the action on the ground of professional misconduct in filing with knowledge that it was not likely to succeed a defence putting the plaintiff to proof of her allegations and also filing inadequate affidavits of documents which the solicitor could not help knowing were false. It was proved that a managing clerk of the solicitor had the conduct of the case and at length when the solicitor intervened a further and adequate affidavit of documents was obtained. Singleton, J., held that the solicitor was not guilty of misconduct in allowing the defences to be delivered but was guilty in allowing inadequate and false affidavits of documents to be filed and ordered the solicitor to pay 1/3rd of the plaintiff's costs of the action and 2/3rd of the costs of the application. On appeal

Held (Greer and Slesser, L.JJ., MacKinnon, L.J., dissenting). the punitive powers of the Court can only be exercised when the solicitor has himself been guilty of misconduct and he cannot be made liable because a clerk whom he was entitled to trust has been guilty of the conduct complained of. Per *MacKinnon, L.J.*, on principle the solicitor ought to be held responsible for the misconduct of his clerk.

TATEM, LTD. *v.* GAMBOA, (1939) 1 K.B. 132.

Contract—Charter of ship—Frustration of adventure by seizure of ship—Liability of charterer for hire.

The plaintiffs as owners chartered and delivered to the defendant an agent of the Republican Government of Spain the steamship "Molton" for thirty days from July 1, 1937. On July 14 the ship was seized by a Spanish Nationalist ship and was kept in custody until September 7. She was re-delivered to the plaintiff on September 11. The defendant had paid in advance hire up to July 31 and on August 18 intimated to the plaintiff he would have nothing more to do with the ship. Plaintiff claimed hire for the period from August 1 to September 11.

Held, the performance of the charter was frustrated from the time of the seizure and the foundation of the contract had been destroyed. Though the parties must have had or must be deemed to have had the matter in contemplation, the doctrine of frustration is not prevented from applying.

JOHN *v.* MENDOZA, (1939) 1 K.B. 141.

Bankruptcy—Creditor abstaining from proving and debtor agreeing to treat debt as subsisting—Annulment reciting payment of debts in full—Subsequent suit—If barred by estoppel by record.

The defendant was adjudicated bankrupt on 4th September, 1935 and the adjudication was annulled in April 1937 on the ground that the defendant had paid his debts in full. The plaintiff at the defendant's request had abstained from proving in the defendant's bankruptcy on the defendant agreeing to treat the debt as subsisting. The present action to recover the amount was commenced after the annulment.

Held, the order of annulment reciting payment of all debts in full creates an estoppel by record and the plaintiff is estopped from coming into another branch of the High Court and contending that a debt is due to him. The plaintiff took no steps to get a new agreement for fresh consideration.

GROOM *v.* CROCKER, (1939) 1 K.B. 194.

Solicitor and client—Solicitor for insured admitting negligence without authority of client but under instructions from his insurer—Duty to client to consult when in doubt and keep informed—Breach of—Liability—Admission of negligence—If a libel—Damages—Nature and measure of—Motor insurance—Term that

insurer shall have absolute conduct and control of all proceedings against assured—If can require the insured to admit negligence.

The respondent's policy of motor insurence contained a term as follows:—"The Society shall if and so long as it so desires have absolute conduct and control of all or any proceedings against the insured (including arbitration and negotiations).

There was a collision between the respondent's car, driven by himself, with his brother as a passenger and a motor lorry owned by T. Brothers. The respondent's brother who was seriously hurt brought an action against the respondent as well as T. Brothers. The appellants were instructed by the insurer to act as respondent's solicitor. T Brothers' driver's negligence was the sole cause of the collision. The driver of T. Brothers' lorry had been convicted meantime for driving to the danger of the public. The insurers paid the respondent direct for the damage to his car, but for his personal injuries he had to claim against T. Brothers whose insurer caused a defence to be put in denying liability and alleging that the collision was caused by the respondent's negligence but they paid into Court (with denial) the sum of £100 which the respondent subsequently took out. The two insurance companies put their heads together in a plan for reducing their total pecuniary liability. Both companies knew that the respondent was not liable for the collision and there was no risk of his being held to blame, while in the action by the respondent's brother a heavy verdict looked inevitable against T. Brothers. The two insurers made a fifty-fifty pooling agreement under which T. Brothers were to be absolved and the respondent's negligence to be admitted. The inducement for the agreement was the bringing into the pool another case altogether in which the respondent's insurers were interested to which they had no defence. In pursuance of the agreement, the appellant on the instructions of the insurers delivered a defence on behalf of the respondent admitting negligence but denying damages. A judgment followed in the respondent's brother's action for damages against the respondent.

The present action was brought by the respondent against the appellant for (1) damages for breach of duty as solicitors expressed alternatively in contract and in tort and (2) damages for libel.

The defence was that the appellant acted on the instructions of the insurance company and had the respondent's instructions and authority through them.

Held, the tie between solicitor and client is contractual and it is an incident of that duty that the solicitor should consult with his client in all questions of doubt which do not fall within the express

or implied discretion left to him and should keep the client informed to such an extent as may be reasonably necessary according to the same criterion. There is today no common law duty similar to that which survives in the case of a bailee or carrier and no action lies in tort for breach of the above duties.

The term in the policy giving the insurer an absolute right of control of their assured's defence is subject to certain implied boundaries and limitations. The insurer was bound to exercise a real discretion upon each question after due consideration of the circumstances of the particular case. The policy conferred on the insurer no right to call upon the appellants to act on their mandate and the appellants derived no authority from them for what they did. The appellants are liable for breach of their contractual duty to the respondents. There cannot be any damages for injury to the respondent's reputation or feelings due to breach of contract.

The letter by appellant admitting negligence on the part of the respondent was capable of a defamatory meaning and the respondent is entitled to hold his judgment for £1,000 on the issue of libel.

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD, (1939) 1 K.B. 266.

Principal and agent—Fraud committed within agent's ostensible authority—Liability of principal for damages.

The defendant was a solicitor practising in London with a branch office at Slough managed by Conway who with the help of some forged title deeds induced the plaintiff to advance a loan on a fictitious mortgage. In a claim for damages for the fraud of the defendant's agent,

Held, where a fraud is committed by an agent within his ostensible authority the principal is liable.

Lloyd v. *Grace Smith & Co.*, (1912) A.C. 716, followed.

MARTHEWS *v.* MARTHEWS, (1939) P. 97.

Divorce—Prior petition for judicial separation—Withdrawal—Subsequent petition for divorce on the ground of desertion—Effect of first petition on desertion.

The petition for judicial separation created an interregnum at least, in the running of the period of desertion and precluded the petitioner from pleading that the period of desertion was running during the time that the suit was being maintained.

Stevenson v. *Stevenson*, (1911) P. 191, followed.

WALTON *v.* WALTON, (1939) P. 104.

Divorce—Petition founded on adultery dismissed—Second petition on the ground of desertion—Suspension of period of desertion during pendency of first petition.

Held, following *Marthews* v. *Marthews,* (1937) P. 97, the effect of a petition for divorce or judicial separation is to suspend the legal obligation upon the spouses of living together. So long as the legal obligation is in abeyance there can in law be no desertion.

PRATT *v.* PRATT, (1939) P. 117 (C.A.): (1939) 1 All. E.R. 503 (C.A.).

Divorce—Desertion—Refusal by husband to see or discuss the position with deserting wife—If desertion without cause.

When two married persons are living apart in circumstances which constitute desertion of the one by the other and the guilty party writes to the other and asks for an interview to discuss the position, there is a duty on the party receiving that request at least to see the other spouse and give him or her an opportunity of saying what he or she wishes to say. When the husband refuses to see or discuss the position with the wife the desertion by the wife is not without cause.

JOTTINGS AND CUTTINGS.

THE HON'BLE MR. JUSTICE B. SOMAYYA.

The solemn ceremony of the swearing in of Mr. Justice Somayya was gone through on Thursday, the 2nd February, 1939, in the presence of a large gathering of Advocates and the staff of the High Court, before a Bench consisting of the Hon'ble the Chief Justice, Mr. Justice Varadachariar, Mr. Justice Burn, Mr. Justice Gentle and Mr. Justice Stodart. After the new Judge assumed his seat on the Bench the Advocate-General offered him the felicitations of the Bar as follows:—

" My Lord on the assumption of your high office, as one of His Majesty's Judges, permit me, on behalf of the Bar, to offer our hearty felicitations. If my recollection serves me right, after a distinguished career in the University, when you had to start your work at the Bar, with your innate sense of modesty, you felt a certain nervousness in resolving to join the profession in Madras and discussed the situation with me, a comparative junior in the

profession then, before you entered into articles of apprenticeship under the late Mr. P. Narayanamurthi. Since then, by your ability and learning, your prodigious industry, the quickness with which you mastered the facts of any complicated case and your sole and undivided attention to the profession, you have fought your way up and become one of the acknowledged leaders of this Bar. Your Lordship has had experience on every side of work of this Court and in the mofussil. It is a source of pride and satisfaction and no small consolation to me to recall that, in several cases, both in the mofussil and in this Court, we appeared together, an experience which enables me to speak with an intimate acquaintance of your work and attainments. Your unostentatious simplicity, your winsome manners, your discreet reticence, when called for, your unfailing courtesy to your opponents and your readiness to oblige your friends at the Bar, have endeared you to the profession. Let me wish Your Lordship a long and distinguished career on the Bench, dispensing justice without fear or favour, in fear of God and in fear of no man, and maintaining the best traditions of this High Court, which has always stood high in the estimation of the public and of the profession all over India."

Mr. Justice Somayya, in reply to the good wishes, thanked the Advocate-General, and said: "I appreciate very much your kind words of welcome, as you have spoken them from your personal knowledge of my career at the Bar from the very start. As you are aware, the duties and responsibilities of an Advocate, are very important, and your reference to my success at the Bar is particularly pleasing to me. But I conceive the duties and responsibilities of a Judge are even more onerous and I enter upon my career on the Bench with a full consciousness of that fact. I am sure I can always count upon the co-operation of the Bar in the discharge of my duties. It is easy for an Advocate to espouse the cause of a client, but it is much more difficult for a Judge to decide between conflicting claims. It remains to be seen how far I shall be successful in my new sphere of work, but I assure you, Mr. Advocate-General, that I shall constantly bear in mind the solemnity of the Oath that has been administered to me, this morning, by my Lord the Chief Justice."

THE HON'BLE MR. JUSTICE M. PATANJALI SASTRI.

On Wednesday, the 15th of March, the new Judge was solemnly sworn in before a Special Bench consisting of the Chief Justice, Mr. Justice Burn, Mr. Justice Venkataramana Rao, Mr. Justice Lakshmana Rao and Justice Sir Abdur Rahman.

The Advocate-General (Sir Alladi Krishnaswami Aiyar) conveyed to him the felicitations of the Bar:

"In giving expression to my sentiments and affectionate regard on this happy and auspicious occasion, I have necessarily to put a certain restraint upon myself, if only by reason of my intimate association with your Lordship for several years at the Bar from the commencement of your professional career, nay, from the days of your apprenticeship. By your learning and ability, your keen grasp of the complicated facts of the cases in which you were engaged, your single-minded devotion to your profession, by the high professional standards which you maintained and your skill as an advocate, you have fought your way up to the front ranks of the profession and deservedly attained a leading position at the Bar winning the confidence and esteem of the Judges before whom you practised.

"With your intimate knowledge of Income-tax law which is becoming an increasingly difficult and complicated branch of the law to interpret and administer, your large experience of Nattukottai Chetti litigation which, even at the present day, contributes a good portion of the work of this Court, your acquaintance with Chetti customs and usages and their banking institutions, your Lordship would be a great source of strength to the Court in the different spheres of its work.

Let me conclude by wishing you a distinguished career on the Bench and may your Lordship long continue to dispense justice in keeping with the highest traditions of this Court and of the Bar."

Mr. Justice Patanjali Sastri's reply.—" Mr. Advocate-General and friends of the Bar,—I thank you very much for the kind and glowing terms in which you have welcomed my elevation to the Bench. I am not vain enough, however, to take them at their face value. I am alive to my shortcomings and my sense of them is heightened as I remember that I have been called upon to take the place of a great Judge who now adorns the Federal Court. But I have this advantage that in the discharge of my new duties and responsibilities, I have before me an example which I could emulate and follow to the best of my ability.

Mr. Advocate-General, this is not the occasion for me to indulge in reminiscences, but your presence here to greet me on this occasion inevitably recalls to my mind the fruitful and stimulating association with you in many notable causes in the early days of my career at the Bar, the memories of which I have always cherished in grateful remembrance.

How far I shall rise to the new responsibilities, time alone will show, but I can assure you that it shall be my constant endeavour to discharge conscientiously the duties of my office and I hope to have a full measure of co-operation from the Bar in that task. And if I am fortunate enough at the end of my new career to secure from the Bar and the wider public a verdict as appreciative as the sentiments you have now expressed I shall feel more than gratified. I thank you once again, Mr. Advocate-General, for the very kind welcome you have extended to me on this occasion."

Constitutions.—The beginning of the twentieth century will probably be regarded as an experimental period in the growth and making of national constitutions: the growth of those which are already established; the making of new ones. There has been no doubt about the growth of the British and American constitutions. In form unchanged, each shows practical development, the British especially in the consolidation of Mother Country and Colonies in the British Commonwealth of Nations. Elsewhere new forms are being tried, but, as the Prime Minister reminded his hearers at the jubilee dinner of the Foreign Press Association on Tuesday night, history teaches us that no form of government ever remains the same, and the subordination of individual independence to something which is called the State, but which, as he also said, only means those who for the time being rule the State, may be only a passing phase. While, however, these experiments may be watched with interest and without undue anxiety for their ultimate results, we may be confident that our own country will still remain untouched by novelties:

The land where, girt with friends or foes,
A man may speak the thing he wills.

—L.J. 1938, p. 415.

A New Point in Tort.—First of the legal novelties of the week is undoubtedly *Owens* v. *Liverpool Corporation.* A collision between a tram and a hearse, due to the negligence of the tram driver, resulted in the displacement of the coffin containing the body of a man on the way to his last resting place. The mourners, near relatives of the deceased, witnessed the accident and suffered in consequence the shock which would naturally be caused by the incident; and they claimed damages in respect thereof.

Deputy Judge Harrison, at the Liverpool Court of Passage, held that the plaintiffs did in fact receive injury as the result of seeing the damage to the hearse and the displacement of the coffin, and he assessed the damages as follows: *75l.* for the mother of the

dead man; 15*l.* for the uncle; 100*l.* for the cousin; and 11*l.* for the cousin's husband. In his view of the law, however, it was necessary, in order to establish legal liability, that there should be apprehension of injury to some living human being, or the sight of such injury to a human being; and on that view his judgment was for the defendants. He left it to the Court of Appeal to say whether his view of the law was right or wrong.

MacKinnon, Goddard and du Parcq, L.JJ., accepting the Deputy-Judge's findings of fact, and feeling they ought to accept his findings as to the amount of damages, held that the plaintiffs were entitled to recover the damages as assessed and they allowed the appeal with costs.

Leave to appeal to the House of Lords was given, but only on condition that the Liverpool Corporation undertook to pay the plaintiff's costs of such appeal in any event. The Court observed that the case raised a point of principle of general importance.

In this leading case counsel were Mr. R.H. Forrest for the appellants, and Mr. Glynn Blackledge for the respondents; and the solicitors were Messrs. Neville, Mullen and Co., Liverpool; Mr W.H. Baines, Town Clerk, Liverpool.—*L.J., 1938, p. 426.*

More Cat.—Continuing to speak (in despite of protests) with the greatest respect whenever I dare to speak of any judge, I do so now and with sincerity, making mention of Hilbery, J. A good judge, a good man; a golfer better than his handicap; a sailor who upon occasion can talk stirringly and accurately of the high seas and deep sea sailormen; and who, while conceding full marks on their merits to steam, internal combustion, auxiliary and other modern engines and contraptions aboard ship, can still regret, like a true mariner, the passing of sail.

So when, at Glamorgan, he imposed a severe sentenee on a fruit salesman "so that others may know that seamen in liquor who have been paid off cannot be made the prey of those cruel enough to try and rob them," the heart warmed to his words and felt that they were good. Yet do I crave indulgence to express doubt and some wonder at the Judge's seeming faith in the deterrent and exemplary effect of those 15 lashes with the "cat".

The "cat" was long ago abolished in the Navy, and yet our naval ratings, I assert, are none the worse. He is no "flogging judge", and he made it plain that he considered the 'cat' useful only in certain cases, and in respect of persons, "not a few—as every judge knows—who would commit crimes which showed them to be too brutal to be brutalised or too depraved to be reached by

reformative treatment. Such punishment", said he, "is therefore still a necessary adjunct of justice."—*L.J., 1938, p. 427.*

Yet a Little While.—This was said at a time when, without one dissentient vote, Sir Samuel Hoare's Bill abolishing corporal punishment in those very cases had passed the House of Commons. His conclusion, based on "the great body of evidence collected by the Committee", was that flogging "is out of date; it does not deter the particular individual upon whom it is inflicted from offending again; it does not protect society from similar crimes in the future".

Well, the King's Bench Judges, as we know, thought and continue to believe otherwise; and for a little while yet the law permits them to order the "cat" in certain cases as and when they believe it to be appropriate to the crime.

One thing is certain: the fruit merchant was not deterred from his crime by the fear of flogging. And suppose flogging were a certain consequence following conviction for any specified kind of crime. Would that deter others? The King's Bench Judges cannot know from their experience as judges or as advocates. Death is a more fearful punishment than flogging; but death did not deter or prevent the commission of brutal crimes when death was the penalty. The evidence of history, so far as it is known, seems to be against the judges; for those crimes did not increase but diminished when death and flogging were taken away and replaced by other punishments and methods of reform.

Having said as aforesaid, I will frankly confess that there are offences for which it would give one great satisfaction to flog, hammer or otherwise maltreat an offender found in the act of committing certain acts of cruelty or violence. But such simple vengeance is for good reason denied us, and is in itself a crime; and the lawful post-trial triangle, long after the event, is a poor, if not a brutalising, substitute.—*L.J., 1938, p. 427.*

Memorial to Lord Oxford and Asquith.—According to the *Manchester Guardian* steps are in progress to have erected within the precincts of the House of Commons, where he spent the major part of his later years, a memorial to Lord Oxford and Asquith. It appears to be one of the unwritten rules in such matters that no memorial should be set up in the Houses of Parliament to a departed statesman until after the lapse of ten years from his death. That term of years has run since Lord Oxford and Asquith passed away, and, accordingly, it is fitting that he

should thus be remembered in the place of his later activities. While he played a prominent role in public life for many years, we like to recall him also as a distinguished member of the Bar. In his legal youth he "devilled" for Sir Henry James, who generously acknowledged the invaluable service he received from his "devil". In the biography of Sir Henry mention is made of a striking instance of valuable help received from Mr. Asquith as he then was. It occurred during the heat of the long drawn out battle between Bradlaugh and the House of Commons on the question of the oath. Mr. Gladstone, then Prime Minister, asked Sir Henry, who was at that time the Attorney-General, for a memorandum and history of the parliamentary oath. This task Sir Henry deputed to his "devil" who carried out his instructions with despatch and handed the result to Sir Henry who passed it on to Mr. Gladstone. Having read it, the Prime Minister said to Sir Henry, "I must thank you for the magnificent statement you have sent me touching the Bradlaugh affair." To this Sir Henry replied, "I have no personal claim to your gratitude, Mr. Gladstone, for I have not written a word of it." Being asked the authorship, Sir Henry told him that it was "a young man named Asquith," whereupon Mr. Gladstone said that "he must have a remarkable brain, for it is a masterly document". Following upon this, Asquith was introduced to Gladstone by Sir Henry, and in the young author of the memorandum Gladstone found one of his most devoted followers. Sometimes we are inclined to wish that the young lawyer who showed such promise in the legal sphere should have remained in the law, whose principles and whose practice he knew so thoroughly; it was not to be; but the legal bent so strongly marked in him was in due time handed on to his son whom we now know as Mr. Justice Asquith.—*S.L.J., 1938, p. 997.*

Baron Greer and Others.—The legal world congratulates Lord Greer on the barony conferred on him by His Majesty, whereby he becomes a Peer of the realm and will be available to hear cases and deliver judgments in the highest of our tribunals. The honour comes timely and soon after his retirement from the Court of Appeal; and his availability for work in the House of Lords and J.C. appeals is good news for those fortunate practitioners who may reasonably expect to have opportunities of addressing their arguments, good or bad, to a judge at once so courteous and so learned.

Sir Maurice Hankey on the same day became a peer, and lawyers and legislators are greatly pleased. Amongst the new Knights on the Prime Minister's list is that most popular of

Masters, Ernest Arthur Jelf, who is also the King's Remembrancer; and Gerald Dodson, Recorder of London, who can introduce and explain a Lord Mayor or welcome a King in choice and happy words; and who, despite his youth, can preside as judge in civil and criminal cases with all due learning, solemnity and humanity.

I would mention also in this place the Knighthood of Sir Harry Vanderpant, who, although he had no occasion to practise at the Bar for life or living, is a barrister of Gray's Inn and from his early student days has taken an active and helpful interest in the well-being of the Inn and its members. In public work he is Mayor of Westminster and Chairman of the London and Home Counties Traffic Advisory Committee.—*L.J., 1939, p. 12.*

Concerning Men of Straw and a Miss Tickle.—In the bad old days, according to report, it was the practice of fellows of the baser sort desiring employment as false witnesses to walk to and fro in Westminster Hall with a piece of straw stuck in the boot as a sign whereby lawyers might know that they were available for work in their profession or calling. An advocate in need of a witness might walk up to such a one and show him a coin; and if it was inadequate the wearer of the straw took no notice of the prospective employer and his fee. When the sum proffered was sufficient the witness showed signs of recognition and remembered all that was required. Hence, according to report, the expression "Man of Straw".

From the same source comes another and a different story. The great Erskine happened once to appear for a certain Miss Tickle, and thus addressed the court. "Tickle, my client, the defendant, my Lord . . . ." "Tickle her yourself, Harry", said his friend the Judge. "You're as well able to do it as I am".—*L.J., 1939, p. 13.*

BOOK REVIEWS.

MAYNE'S HINDU LAW (10th EDITION) by Mr. S. Srinivasa Aiyangar. Published by Messrs. Higginbotham & Co., Ltd, Mount Road, Madras. Price Rs. 21.

It has been well and truly stated that 'Mayne's Hindu Law became, from its first edition, a classic and from its third, nearly one of the sources of Hindu Law.' Certainly, it has become an indispensable book for study and reference, to the Hindu Lawyer and to the Judge who administers Hindu Law. In fact, before the Judicial Committee, it is a book of authority on intricate questions of

Hindu Law. The development of case-law and the progressive changes brought about by it necessitated the publication from time to time of many editions of the book. Mr. Mayne himself was responsible for seven editions. The task of the publication of the 8th edition was entrusted to Sir C. Sankaran Nair and the 9th to Sir V. M. Coutts-Trotter, Chief Justice of the Madras High Court. It is now 16 years since the 9th edition and a new edition is none too late. The Publishers, Messrs. Higginbotham & Co., could not have done better than entrusting the work to Mr. S. Srinivasa Aiyangar, one of the foremost Hindu Lawyers of the present day. During the interval between the last edition and this, more than at any earlier period, there has been a considerable addition to the body of case-law and important changes have been effected by Legislation from 1914 to 1938. The work of writing a treatise on Hindu Law has always been attended with peculiar difficulties. A thorough knowledge of the original sources and their technique and interpretation, a scholarly mind imbued with the love of truth and impartial research, a firm grasp of the legal principles evolved by Hindu jurists, a sound and well-informed historical sense and, last of all, prodigious industry and intimate acquaintance with the mass of Indian case-law, are absolutely necessary for the production of a standard treatise on Hindu Law. Fortunately for us, within the last 20 or 25 years, the wealth of material made available to the student of Hindu Law is, indeed, very great. Many original works, commentaries and digests forming the source of Hindu Law have been translated into English and some rare books hitherto buried in manuscripts have come to light. Distinguished Oriental Scholars have also made specialised study of some of the branches of Hindu Law and produced treatises on them. The task of an author is therefore rendered easier now than ever before and a modern editor is, in many respects, in a position of greater advantage than Mr. Mayne. In his preface to the 1st edition in 1878 Mr. Mayne says: "I cannot conclude without expressing my painful consciousness of the disadvantages under which I have laboured from my ignorance of Sanskrit. A really satisfactory treatise on Hindu Law would require its author to be equally learned as a Lawyer and an Orientalist." One can well realize the difficulty caused by the ignorance of the original sources and the absence of translations. Sir James Colvile in delivering the judgment of the Board in 11 M.I.A. 139, on the question whether under the Hindu Law received in the Benares School a childless Hindu widow had power to alienate any portion of the property of her husband was constrained to make the following significant observation: "We have not the whole Mitakshara. Mr. Colbrooke in his preface states that his

work included only an extract from that celebrated treatise comprising so much of it as relates to inheritance". A very important question had, therefore, to be decided by the highest judicial tribunal without having had access to the whole of the work which forms the main source of Hindu Law. All students of Hindu Law also know that much of the misconception in the earlier period of the administration of Hindu Law has been due to the mistranslation of the word "Sapinda" as used in the Mitakshara.

An edition therefore by an author who possesses the needed qualifications in a remarkable degree must surely be acclaimed by the legal world. Every topic here has received fuller treatment and the case-law has been brought entirely up-to-date. The learned author has, on questions arising in Hindu Law both in its historical aspect and in its application, arrived at sounder and more accurate conclusions than were possible a generation or two ago. It is refreshing to read the following words of Mr. Srinivasa Aiyangar conveying the net impression of his study of the original sources: "The one astonishing experience of any student of Hindu Law who carefully studies the Commentaries and Digests is the impression he receives of the remarkable ability and vision of the Hindu jurists, their grasp of principles and their seminal ideas. Once you get behind their unfamiliar garb and utterance, you get into contact with acute and accomplished lawyers who would be a credit to any age or country". These observations are worthy of being remembered by everyone who approaches the task of studying or reforming the Hindu Law. No doubt, it is possible for one to take other views than what the author has done on some of the questions such as the validity of inter-caste marriages and the place of custom and usage in Hindu jurisprudence. But one is glad to say that on certain other questions, the reader will readily endorse the opinion of the author, *e.g.*, on the Gandharva form of marriage and his well-informed criticism of the view that the limitation of five degrees applies only to Bandhus related through one's mother and not to cognates related through the father's mother. It is not feasible within the compass of a review to make a detailed reference to all the points and conclusions especially those raised by the Hindu Women's Right to Property Act (XVIII of 1937) in respect of which the learned author has brought to bear his fresh and well-informed outlook. Generally speaking, one will be justified in saying that the present edition is a complete authoritative treatise on Hindu Law containing ample material from the original sources as viewed in the fuller light of modern research and full reference to the up-to-date case-law reviewed from the standpoint of sound legal principles. It is well that the author has dealt with separately,

the two important subjects of the Marumakkathayam and Aliasanthana Law and impartible estates. Appendix III gives to the reader a clear conspectus of the Malabar Law brought up-to-date by modern decisions. It is gratifying to note that in his task the author has associated with himself a band of brilliant young lawyers whose industry, keenness and research must surely have been of great help to him. We are sure that the present edition will prove a land-mark in the study of Hindu Law and will be a work of inestimable value to every student of Hindu Law. A word of praise is due to the Publishers, Messrs. Higginbotham & Co., for their neat and accurate printing.

THE NEGOTIABLE INSTRUMENTS ACT, by Messrs. K. Bhashyam and Adiga (7th Edition), 1939. Published by The Eastern Law House, Calcutta. Price Rs. 12-8-0.

It is with pleasure that we welcome the seventh edition of Bhashyam and Adiga's Negotiable Instruments Act. Since the appearance of its first edition, it has become recognised as the leading text book on the subject which is one of increasing importance in the commercial life of the country. The merits of the work are so well known to the Judges and lawyers here, that it is not necessary to draw attention to its general features. It is however not out of place to point out that by the close association of the law of negotiable instruments to banking, this aspect has been fully brought out and discussed in the pages of this book. The appendices which are comprehensive in the nature of the topics dealt with have been re-arranged in the present edition and some amount of overlapping and repetition of matter has been avoided. The learned author has avoided the more easy method of collecting the cases under each head and giving them without offering any suggestions or opinions of his own on the points decided. He has offered his own suggestions and criticisms on the points dealt with which will have the salutary effect of provoking thought. We wish to draw special attention to the criticism at pages 176 *et seq.* of the recent decision of the Full Bench of the Madras High Court in *Satyanarayana* v. *Mallayya*, (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735, where the learned Judges held that in respect of a promissory note executed by the guardian of a minor which was not signed by her as such but which was executed for necessary purposes and she described herself as guardian in the body of the note, she was exempted from personal liability but the minor's estate was held liable. This branch of the law is in an unsatisfactory state and requires clearing up by legislation, if necessary, by reason of its importance and the conflict of the various

principles involved. One of the recent decisions of the Privy Council which has created a stir among the commercial interests and the investing public in this country is the case of *Secretary of State* v. *Bank of India, Ltd.*, (1938) 2 M.L.J. 169: L.R. 65 I.A. 286 (P.C.), which is believed to have impaired to the security of the holders of Government Promissory Notes. We should like to have had the opinion of the learned author on the correctness and implications of this decision. The book has increased in its size by the additional matter introduced in the present edition and the author has done well in not putting up its price appreciably on that account, with a view to place it within the easy reach of all practitioners. We have every hope that this edition will be even more widely used and appreciated by lawyers and Judges than its predecessors.

THE LAW OF REGISTRATION, by Mr. K. J. Rustomji, Barrister-at-Law (3rd Edition), 1939. Published by Messrs. Butterworth & Co. (India) Limited. Price Rs. 10.

The third edition of Mr. Rustomji's Law of Registration is as characteristic of the learned author as his other legal works for its thought provoking nature. His arresting mode of criticism of decisions can be judged from the prefatory note itself where two of the latest decisions, one of the Calcutta High Court and another of the Madras High Court, have been adversely commented on. The recent legislative changes in the Law of Registration and the judicial decisions have necessitated a practical re-writing of large portions of the book. For thoughtful suggestions and guidance and for clear statements of the law and effect of decisions on the subject, no book is more useful than Mr. Rustomji's Law of Registration. We have therefore every hope that this book will be consulted as one of the leading text books on the subject.

THE LAW OF THE INDIAN CONSTITUTION, by M. Ramaswamy, B.A. B.L. (with a Foreword by Professor A.B. Keith): Longmans, Green & Co., London. 21 *sh.* net).

There is no other subject now which has attracted greater attention from constitutional lawyers both in India and England than the Government of India Act of 1935. Indeed, the change into a federal constitution effected by the new Act, even if it is of the simplest type, cannot be considered so easy or less fraught with difficulty. Naturally, when we think of a country like India with large portions still under Indian Ruling Princes, the legal implications attendant upon an effective functioning of the federal consti-

tion such as the Government of India Act has provided, cannot be said to be of a nature quite parallel to the other federal constitutions of the World, like those of the Dominion of Canada and the United States of America. This feature is really peculiar to India and therefore the distinct legalism which is generally associated with a federal constitution must be more marked here.

The author of this well printed and elegantly got-up volume has tried in an adequate degree to impress upon us, in his introduction, the inevitability of a step like the Government of India Act, 1935, if at all India should move towards her goal of an honoured place soon among the Dominions in the British Commonwealth of Nations.

The first few chapters are devoted to an accurate and sumptuous history of the period leading to the passing of the present Act. In the chapters on Indian States and Federalism the real difficulties which could be anticipated in a legal discussion of the constitution are well dilated upon, and we have in the chapter on the 'Interpretion of the Constitution' a closely reasoned and erudite presentation of analogies from interpretations of the constitutions of the other existing federal countries. . No doubt, the innumerable sections of the Act have not been always dealt with accompanied by a closely running textual commentary, because, evidently, it does not come within the scope of this treatise. But there is ample valuable information in the form of case-law and precedents in necessary places, as when dealing with a chapter like that containing Legislative lists and powers.

To the student of Constitutional law requiring a correct picture of the Indian constitutional growth up to the present time with a view to enabling him to appreciate the character of the changes introduced by the present Act, this book has much to give. We have every reason to believe that even lawyers having to concentrate more upon important sections of the Act involving legal principles or sometimes problems peculiar to Indian. federation, may not feel disappointed in securing the help that is necessary for an able elucidation of the Act.

THE
MADRAS LAW JOURNAL.

I] APRIL [1939

LAW AND RELIGION.

THE HON'BLE MR. JUSTICE S. VARADACHARIAR.

(*Continued from p. 62.*)

The period from the ninth or tenth century to the seventeenth or early eighteenth century may roughly be taken as the era of the appearance and growth of the *Nibandha* works. The different commentators who flourished in different parts of India reflected in their works the ideas and conditions prevailing in their respective parts of the country at or about the time that they lived and wrote. One must remember the history of the times in which they lived, when estimating their work or passing opinions about them. Otherwise, one is apt to be carried away by the criticism that "In Europe the thirteenth century marks the beginning of the ascending movement; in India it was the beginning of the dark ages." Even great empires like Vijianagar, despite their glory and splendour, did not achieve anything like a judicial system that could at all compare with modern ones. In many parts of India there was Moslem rule. So far as Hindu law was concerned, there does not appear to have been much of State administration of the Hindu law, though some of the well-known commentators seem to have been in some way associated with particular rulers. The administration of justice must, in all probability, have been the work mainly of panchayats. In such conditions, it was impossible to expect anything like an ordered development of legal administration or of systems of law and jurisprudence. It was therefore to the greater credit of the commentators that they did so much, in spite of adverse circumstances, to keep up a continuous attempt to adjust the law to changing conditions and to dissociate civil law as far as possible from religious observances. They did not and could not altogether turn away from the ideas deeply rooted in the

system. But, consistently with those ideas, they tried their best to develop a kind of jurisprudence which could stand comparison with any of the corresponding age in other countries.

So far as I have read and understood the Hindu law books, I have found no basis for the charge that the priestly classes stood to benefit by the changes that were made for ill or well in the Hindu law. I can understand the priestly class being interested in the *prayaschitta* and *achara kandas*. But I have never been able to understand the remark so frequently made by the people of the West, and repeated by others here also, that it was for the purpose of consolidating its influence and augmenting its emoluments that the priestly class subordinated the interests of the Hindu law to its own interests. I have, for instance, found it sometimes stated that the priestly classes encouraged partition, because after partition each of the divided coparceners has separately to perform the *Shradha* of his parents and this increased the gifts to the priestly classes. This seems to me, even if true, to amount to no more than the remark that one sometimes hears that lawyers are interested in the institution or multiplication of partition suits. It may be regrettable if this is so; but it has no bearing on the development of the law itself. It only helps the tendency latent in human nature to prefer the individual advantage of the coparcener to the corporate benefit of the joint family. After all, few of our critics seem to be enamoured of the joint family system and one wonders why they should blame the priestly classes for the breakdown of the joint family system. On the other hand, it has sometimes been pointed out, in explanation of the *Dayabhaga* system, that it was the exigencies of growing trade and business that led to the earlier disappearance of joint ownership of property in Bengal. In one place, Sir Henry Maine observes that by connecting the ownership of property with the performance of funeral rites, Hindu jurists became more and more reluctant to place property in the hands of women; but when he came to deal with the texts recognising the rights of inheritance of women and heirs descended through women, he would not give credit to the authors for more liberal ideas but would prefer to attribute these texts to the desire of sacerdotal lawyers to multiply the number of persons from whom they could receive presents by extending to them the privilege of offering sacrifices or *pindas*. Against such prejudice, there is, of course, no arguing.

One service that the author of the *Mitakshara* rendered to the Hindu law was to dissociate religious considerations from civil law as far as possible. This is clear from his definition of *Daya* and from his scheme of inheritance. By a long disquisition at the commencement of the chapter on partition, Vignaneswara seeks to establish that the conception of property is of secular origin, though property may have its use in the performance of religious rites and sacrifices. He defines *Daya* as wealth which becomes the property of another *solely* by reason of relation to another. With this may be compared the definition given by Jimutavahana, according to whom *Daya* is wealth in which property dependent on relation to the former owner arises *on the demise of that owner.* The latter definition better accords with modern ideas of inheritance; but the author of the *Mitakshara* did not treat *Daya* as identical with "inheritance", because in the case of inheritance, properly so called, the propositus will ordinarily be the full owner—this is the Bengal theory—whereas, according to the *Mitakshara,* the ownership of the propositus has in some cases to be qualified by the recognition of the son's right by birth even during the father's life time. Death of the propositus is not, according to Vignaneswara, the *origin* of the successor's right, but only the removal of an obstacle (*pratibandha*) in his way. Hence his classification of *Daya* into *apratibandha* and *sapratibandha* (unobstructed and obstructed). What is important in the present connection is that by thus dissociating death from the definition of *Daya,* and ascribing *Daya* to relationship, he was able to carry the principle of secularisation further, so that when he came to the law of inheritance he could wholly base it on the doctrine of consanguinity as distinguished from the theory of spiritual benefit. The *Smritis* had enumerated the heirs specifically only up to the end of what is known as the "compact series", that is, up to the brother's sons. Beyond this followed the two groups of *Gotraja* and *Bandhu,* and in fixing the order of succession amongst heirs falling within these groups, Vignaneswara has given full scope to his doctrine of "consanguinity". There can be little doubt that "consanguinity", as the basis of the right to inheritance, is more in accordance with modern ideas than the theory of spiritual benefit.

Even in the *Dayabhaga,* there was some attempt to dissociate religion from civil law; Jimutavahana's doctrine of

"Factum Valet" is of special significance in this connection. Even where he brought in arguments based on religious efficacy, he seems to have done so not out of a desire to make Hindu law more archaic but with a view to advance it and liberalise it, with the aid of the accepted religious notions. In this way, he succeeded in making the father absolute owner even of property inherited by him from his father, in making brothers tenants in common of property inherited from their father and in improving the chances of succession of women and of *Bandhus*, bringing in some *Bandhus* even before *Gotraja Sapindas*.

The one charge that has to be made against the author of the *Dayabhaga* is in respect of the nature of the estate which he accorded to women in his scheme of inheritance. In this matter the *Dayabhaga* and the *Mitakshara* differ. Vignaneswara was prepared to treat property inherited by a woman as her *Stridhana*, but Jimutavahana was not prepared to do so and insisted on the "reverter" of the estate to the heirs of the last male owner, treating the woman's succession as a mere interposition. It is unfortunate that the Privy Council preferred Jimutavahana's views to those of the author of the *Mitakshara* in this matter, even so far as some of the areas governed by the Mitakshara are concerned. If the trend of development appearing in the *Mitakshara* and the other works following it had been allowed to grow in the ordinary course, there is no reason to think that Hindu law would not have reached a plane of development comparable, if not superior, to modern legal systems. Take, for instance, what is now known as the Bombay school. The author of the Mayukha found no difficulty in reconciling the Hindu law texts with more liberal views as to the rights of women. (*See also* the work of *Balambhatta*). In Bombay, scholars are now attempting to compile a work known as the *Dharma Kosa*, arranging therein under various heads, all relevant extracts from the earliest *Smritis* and even from the Vedas to the latest commentaries—a bird's eye-view of Hindu law as it were under given headings. This work, when completed, would help to give one a clear idea of the evolution of Hindu law from time to time. It is the absence of facilities for a study of that kind that has led to a great deal of misconception about the Hindu law.

The prevalent misconception about the attitude of the Hindu law towards women compels me to make more than a

passing reference to that topic. About fifty years ago, Sir Gurudas Banerji observed (in his Tagore Law Lectures):

> "Nowhere are proprietary rights of women recognised so early as in India and in very few ancient systems of law have these rights been so largely conceded as in our own."

Strangely enough, it was about the same time that Sir Henry Maine spoke of the excessive harshness of the Hindu law to the personal and proprietary liberty of women and he referred to the sustained effort on the part of the Brahminical writers on mixed law and religion to limit the privileges of women which they seem to have found recognised by older authorities. In another connection, Maine stated that the Hindu law as to *Stridhana* has undergone progressive deterioration. Even in our days, it is not uncommon to hear it said that women have been treated as chattels under the Hindu law. A familiar couplet पिता रक्षति कौमारे मर्ता रक्षति यौवने । पुत्रश्च स्थाविरे मावे न स्त्री स्वातन्त्र्यमर्हति ॥ (the father protects her when she is young, the husband when she has grown up and the son when she has become old. Women do not deserve to be independent) has frequently been relied on as justifying much of the above criticism. It is not in my province this evening to discuss the problem of the social, economic or cultural position of women in Hindu society. I am concerned only with the legal aspect of the question. But to those who lay undue emphasis on the above *shloka* I must point out that it should be understood as part of a system which by its Upanishads taught the student to treat his mother as divine [मातृ देवो मव]. Even the much maligned Manu has laid down that women must be honoured, that where they are not honoured no sacred rite yields rewards, that where the female relations live in grief, the family soon perishes and that men who seek welfare should honour women. (Manu—Buhler's Translation III, 55 to 59.) For the moment, I propose to restrict myself to the significance of the term *Swatantrya,* as it is of importance not merely in dealing with the social aspect above referred to but also in the legal aspect, and as I am of opinion that the omission to appreciate the distinction between *Swamya* (ownership) and *Swatantraya* (dominion or power of independent disposition) is responsible for much of the misapprehension about the attitude of the Hindu law towards women. The modern conception of ownership includes, besides the notion of proprietary right, the

elements of (1) the right to transmit the property to the heirs of the owner and (2) the power of unlimited disposition. The Hindu law conception of ownership was different; according to it, *Swamya* did not always imply *Swatantrya*. Not merely was this distinction kept up in the case of women, but it was equally important in the *Mitakshara* scheme as to the rights of the father in a Hindu joint family. By a system of checks and balances, Vignaneswara postulated the equal ownership of the sons in the ancestral property of the father, but recognised limited powers of disposition over the joint property only in the father. None of the joint owners had, according to him, an unlimited power of disposition; it is indeed doubtful if he at all contemplated a transfer of the undivided share by any coparcener. It is remarkable that even in the case of the self-acquired property of the father, the sons had, according to the *Mitakshara*, a kind of ownership during the father's lifetime and though the sons could not interdict a disposition of the same by the father, the latter was nevertheless directed not to dispose even of his self-acquired immovable property unnecessarily or to the prejudice of his sons. It is in the light of this peculiarity of the Hindu law conception as to ownership, especially of immovable property, that the Hindu law relating to the rights of women should be appraised.

It will be convenient to consider the subject under four heads: (1) woman's power to acquire or own property; (2) her power to inherit property; (3) her power to transmit it to her own heirs; and (4) her power to dispose of property. Whatever might have been the position in the pre-*Smriti* days, even the earliest *Smritis* deal with *Stridhana* as a well-known category, thus recognising the woman's right to acquire or own property. Even as regards her right to inherit, I am not aware of any *Smriti* which in terms excludes a woman from succession on the ground of her sex. On the other hand, the earliest texts recognise in specific terms the right of inheritance of at least some women, namely, the widow, the daughter and the mother. As regards the heritability of a woman's property, the law relating to *Stridhana* clearly recognised that a woman might be a fresh stock of descent but notwithstanding the elaborate description of the several kinds of *Stridhana*, the earliest *Smritis* did not expressly deal with the succession to property inherited by a woman. They did not in terms state

the later doctrine of "limited estate" or "reverter". It must also be remembered in this connection that even in the case of *Stridhana*, the property devolved (except in the case of unapproved marriages) on the husband's heirs in default of certain descendants of the woman, whether male or female. It is thus nothing strange that the early *Smritis* did not attach the same importance as the commentators did to the question whether in respect of property inherited by a woman, she was herself to be treated as a stock of descent or not. As I have already observed, the author of the *Mitakshara* and some other writers who followed him were prepared to treat her as a stock of descent even in respect of property inherited by her. But it is the *Dayabhaga* school that insisted on the theory of "limited estate" and the doctrine of "reverter". As pointed out by Mr. Golap Chandra Sarkar, there was even apart from the doctrine of the inferiority of the spiritual benefit conferred by a woman, justification for Jimutavahana insisting on the theory of reverter. According to his system, a widow or daughter inherited her husband's or father's share even in joint family property, because he did not recognise the theory of survivorship. It was, therefore, natural for the other members of the family to feel that in default of certain kinds of issue, the share in joint family property thus inherited by the widow or daughter should not pass out of their family. It will thus be seen that so far as these three heads are concerned, there is little justification for the criticism that the Hindu law has been opposed to the rights of women. When we come to their powers of disposition, the distinction already pointed out between *Swamya* and *Swatantrya* is of special importance; and it must be borne in mind that even in respect of *Stridhana* property, the Hindu law texts did not give an unrestricted power of disposition to a woman.

A further source of misconception has been to regard the Hindu law respecting the rights of *widows* as typical of the Hindu law relating to women. The decisions of the Judicial Committee are to some extent responsible for this view; but this is not consistent with the true spirit of the Hindu law. Its provisions relating to the *widow* were to some extent coloured by the Hindu view as to the kind of ascetic life that a widow was expected to lead; it was unfair to generalise therefrom as regards the position of all Hindu women. The misconception

above referred to was in some early decisions carried so far as to hold that a gift to any Hindu woman, even if it be, for instance, to a daughter or mother or sister, would *prima facie* convey only a limited estate; and it was only later recognised that there was no justification for any such presumption except in the case of gifts to a widow. It is a curious feature of legal history that while the Hindu law imposed disabilities on the widow, the law of mediæval Europe and even of modern Europe till comparatively recent times imposed disabilities on married women during coverture. Sir Henry Maine recognised that Christianity introduced a reaction against the liberalism of the later Roman law as to the personal and proprietary independence of women. How different the position was in India may be seen from the fact that not merely in the law books but even in the Mimamsa works, there is a distinct recognition of the equality of ownership of both husband and wife in the property of the *husband*. It is on this ground that in sacrifices it was insisted that both husband and wife should join, as otherwise the *Swatwa Nivritti* (that is, the extinction of the donor's ownership) in the sacrificial offering will not be complete. The legal position is thus stated in the *Smritichandrika*:

> "It must be understood that in a husband's property the wife by reason of her marriage always possesses ownership though not of an independent character, but that the husband does not possess even such ownership in his wife's property." (Chapter IX, S. 2, pl. 14.)

Lower down, the author observes (in pl. 16) that:

> "Sons and the like possess no ownership whatever over the *Stridhana* of their mother. Hence it is settled that there is no partition of *Stridhana* during the lifetime of the woman."

I do not forget that a few Sanskrit writers have attempted to restrict the rights of women within narrow limits and even sought to exclude them as covered by the term *Nirindriya* in the text of exclusion. But I see no justification for treating them as representing the Hindu law in preference to a writer like Vignaneswara and his successors.

Before an audience of lawyers I do not propose to expatiate on the present state of the Hindu law. The result of a century's administration of the Hindu law by the British Indian Courts has been such that if to-day one of the *Smriti Kartas* should come back to life, he would hardly recognise in the present Hindu law anything like what he gave to Hindu society. What

is now administered as Hindu law in this country is neither the law of the *Smritis* and the *Nibandhas* nor one wholly based on principles of reason, utility or equity. In *Mohori Bibi's case*[1], the Judicial Committee recognised that there could be no equity in favour of a person dealing with one who had no power to borrow or sell. But it is the application of some principle of equity in favour of mortgagees and purchasers that has made the Hindu law relating to joint families anomalous and illogical. We have, further, one rule of law for voluntary alienations and another rule for involuntary alienations, in the *Mitakshara* as administered in Bengal and in the United Provinces. We have interesting problems as to whether the transferee from a coparcener acquires a *jus in rem* or a *jus in personam*, whether the interest transferred becomes fixed or is variable with deaths and births in the family and whether the transferring coparcener ceases to be a coparcener or not. The introduction into law of the theory of "pious obligations" is another source of confusion; and we have had conflicting and indeed irreconcilable pronouncements as to antecedent debts, trade debts and so on. The humorous part of the situation arising out of the enforcement of the son's pious obligation to pay his father's debt is that even when the son has no objection to the father going to Hell and the father is quite ready to go there rather than pay his debt, it is the creditor who has to pretend to be anxious about the father's salvation and accordingly ask the Court to enforce payment of the debt out of the property of the joint family. These illustrations will suffice to show the truth of the criticism of Sir James Stephen that judicial legislation in India has much more of the drawbacks of that kind of law than similar growth elsewhere, because it is in the long run legislation by foreigners who are under the thraldom of precedents and analogies belonging to a foreign law.

That the scheme of inheritance under the Hindu law requires radical changes to bring it into line with modern needs and ideas is scarcely likely to be disputed, though there may be differences of opinion as to the changes to be introduced. The rationalistic principle of inheritance is that the law of intestate succession should, as far as possible, correspond to the probable sentiments of the propositus as to the objects of his bounty and the expectations that may be reasonably entertained by

1, (1903) L.R. 30 I.A. 114: I.L.R. 30 Cal. 539 (P.C.).

How could she be expected to have sympathy for a step-daughter or towards other near relations of the husband in preference to her parents and brothers? But can it be said that the step-daughter and other near relations of the husband had no reasonable claim on the bounty of the deceased? My objection is not to a liberal treatment of the widow, but to the attempt to achieve this object by tinkering with one bit of the law.

In existing circumstances, piecemeal legislation may be unavoidable, during the transition stage; but the proposed legislation should be conceived as part of a logical and comprehensive scheme to be introduced in due course. If people are anxious to make the Hindu law of inheritance logical and perfect, they must put aside the theory of the "nearer excluding the more remote" among the heirs and go in for a scheme of *distribution* of the property of the deceased among different groups of heirs, as under the English Statute of distributions or the Indian Succession Act. I decline to believe that any Hindu would prefer to give away all his property to his widow and leave his mother, father, daughter and other near relations to starve. Inheritance may be limited to a narrow circle of near relatives. Escheat in default of such relatives would be quite in accordance with the views of advanced thinkers like Bentham, Mill and Sedgwick and would give definite advantage to the public exchequer. Hard cases oughtnot to make bad law, whether in the administration of justice or in legislation. After all, the idea of *distribution* is not unknown to the *Dharma Sastras*, for at one stage of the development of the Hindu law, partition consisted of a "distribution" of the estate of the father between sons, daughters and the mother.

Marriage is another question in regard to which liberal changes are being attempted. According to the Hindu conception, marriage is a *samskara* or a sacrament and is intimately connected with the religious rites to be performed by the spouses in their later life. I can understand liberal changes being made in regard to civil marriages and I see no objection to people being allowed freer recourse to civil marriage laws. But those who wish to conform to the sacramental form of marriage should not go in for radical departures from the prescribed rules. The Hindu law books have dealt with marriage

under the head of *Achara* and not as part of *Vyavahara*. It has been observed by a Western writer that:

"Instinct marriage, emotion marriage and intellect marriage has each its dangers, and the problem is how to work out a synthesis of the three component parts."

The traditional ideal associated with the hallowed names of Sita and Savitri seem to me too sacred to be lightly disturbed—at least before society has definitely decided what ideals are to be substituted in its place. It seems scarcely fair that in respect of an institution of such vital importance, the method of "trial and error" should be advocated.

So far as adoption is concerned, it is necessary that the spiritual aspect of it should be dissociated from its civil aspect. There is no reason why the law of adoption should not be made more logical and all the quibbling about "divesting" be put an end to. The decisions of the Judicial Committee in *Bhoobun Moyee's case*[1] and *Padma Kumari's case*[2] relating to the termination of the widow's power to adopt and the invalidity of an adoption after such supposed termination are not consistent with Hindu ideas and are frequently departed from in practice.

Before concluding this discourse I deem it my duty to notice an argument that one frequently hears in these days. It has been sometimes said that the ideals of Hinduism are unprogressive, individualistic and anti-social. The implication is that any system of law suitable to a progressive society, which must be based on the recognition of the need for active social service, as distinguished from the pursuit of individual salvation, must of necessity part company with Hindu religion. I venture to think that this proceeds on a misapprehension of the true principles of Hinduism. I do not here propose to enter into a discussion of the merits or demerits of particular social or religious institutions. Taking the highest ideals prescribed by Hinduism, I assert with some confidence that it is difficult to conceive of a system which has more successfully combined the pursuit of temporal and spiritual ends. At particular stages, and for particular classes of people, our sacred literature might have laid more stress on individual salvation (*Nivritti Marga*), or, as it has been described by Western thinkers, the principle of "world and life negation". But, as observed by Schwietzer,

---

1. (1865) 10 M.I.A. 279.

2. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302 (P.C.).

the conflict in the history of Indian thought between the principle of "world and life negation" and the principle of "world and life affirmation" has been decided by the former ever making greater concessions to the latter. On the other hand, whatever emphasis we may sometimes choose to lay on temporal ends, it is neither possible nor desirable to ignore spiritual ends, understanding the expression "spiritual ends" in its most comprehensive sense. As Dean Inge said:

"If man is not entirely willing to give up this world for the next, he is at heart equally unwilling to give up the next world for this."

The ideal of service is not foreign to Hinduism. The very conception of *Grihasthasrama* is that it should be one of service to fellowmen. It may be that modern notions of service are somewhat different and the demands of society may vary from those that obtained in the past in Hindu society. But to say that the idea of service is unknown or foreign to Hinduism is absolutely untenable. Two statements familiar to most Hindus may usefully be referred to here: one which says परोपकारार्थमिदं शरीरं (this body has been given to us only for service to others), and the other which makes service to fellowmen a part of religion: परोपकारपुण्याय पापाय परपीडनम् ॥. As Sir Radhakrishnan once observed, civilisation in this country has been a sustained effort to embody the highest philosophical truths in social life.

JOTTINGS AND CUTTINGS.

The Masters in Bad Odour.—In the eighteenth century it was the pernicious custom for the Chancellors to sell the offices attached to their court for large sums. According to Foss, Lord Harcourt received £250 for the appointment of Clerk of the Custodies and sums of £700 and £800 from two of the Masters, while Lord Cowper, although he had abolished the objectionable custom of New Year's gifts, received a substantial sum for granting the place of Master. Having to pay such sums for their appointment, these appointees and their colleagues, who were much in the same case, sought to recoup themselves by speculating with the suitors' money of which they had charge. This practice seems to have been in vogue for a considerable time, indeed till 1720, when one of the Masters having absconded in consequence of the failure of his banker, in whose hands he had deposited a large amount of the suitors' cash, the revelations which then came out led to the impeachment of the Lord Chancellor, Lord Macclesfield, for corrup-

tion by selling offices contrary to law and for taking extortionate sums for them with the knowledge that the payment was defrayed out of the suitors' money. As a result of the trial he was found guilty and fined £30,000, and thus suffered for a lax system which had been in vogue for some time, but to which he had bowed by increasing the purchase price of the office of Master in Chancery. —*L.T., 1939, p. 15.*

Rules of Evidence.—A point as to the admissibility in evidence of a statement given before justices by a witness who had since died, as recorded by the clerk to the justices, which was argued before, but not decided by, Lord Justice Finlay sitting as an additional judge of the King's Bench Division last week, is a fresh reminder of the slow emancipation of our evidential rules which have come down to us from the distant past. It is almost unthinkable that it was only in the second half of the nineteenth century that the evidence of the parties to an action were made competent witnesses, and probably many lay readers of the account of the trial of "*Bardell* v. *Pickwick*" regarded it as a mere travesty of a lawsuit, seeing that neither the plaintiff, Mrs. Bardell, nor the defendant, Mr. Pickwick, was called as a witness; but Dickens knew at least this much of the rules of evidence, that at the date of the trial the parties to an action were not competent witnesses. Since those days there has been a somewhat slow improvement of the law as to the admissibility of evidence, the most notable, of course, being that effected by the Criminal Evidence Act, 1898, which enabled an accused person to testify on his own behalf if he so desired.—*S.J., 1939, p. 101.*

Law Reporting.—The Lord Chancellor's attention has been called to the great number of law reports and to the fact that they appear to be increasing, thus causing difficulty to members of both branches of the profession and others. He has accordingly appointed a committee to consider the matter and to advise him upon it. The members of the committee will be: Mr. Justice Simonds (chairman), Mr. Justice Wrottesley, Professor A. L. Goodhart, Mr. L. S. Holmes, Mr. Trevor Hunter, K. C., Mr. C. Le Quesne, K. C., Mr. N. L. C. Macaskie, K. C., Mr. R. F. Roxburgh, K. C., Mr. J. H. Stamp, Professor P. H. Winfield, and Mr. J. F. Woodthorpe.—*L.T., 1939, p. 96.*

THE
MADRAS LAW JOURNAL.

I] MAY [1939

LAW AND LETTERS.*

A few days ago a very welcome invitation was extended to me to take part in these celebrations. I was called upon to address the Advocates' Association in connection with the celebrations and I was given the choice of the subject. I chose this particular one, 'Law and Letters' for a reason which may be familiar to some of you, but, which, I think, requires some explanation. Unlike some others at the Bar, I have not been a specialist in recondite branches of the law. It has not been given to me to share in those intenser raptures partaken of by those to whom law is not only a jealous but a peremptory mistress. Great men of that type have been amongst us and have flourished and shed lustre on the Bar. I remember the story of an illustrious lawyer who afterwards became a Judge, who, having seen a copy of Morley's Compromise on the table of a friend of his, wanted information as to whether the latest case was reported therein. I am not mentioning this for the purpose of detracting from the learning of that Judge but only for the purpose of illustrating my thesis that, to some, law comes with such a special and affectionate appeal that they will not allow literature to share the throne of their favourite deity. To me, law came as one of many things I felt impelled to learn At the beginning of my career, I thought of becoming, and I was disappointed in that I did not become, a teacher of English

* Address delivered by Sir C. P. Ramaswami Aiyar at the Golden Jubilee Celebrations of the Madras Advocates' Association on the 22nd February, 1939, under the Presidentship of the Hon'ble Justice Sir Abdur Rahman.

in the Presidency College and my first and foremost pre-occupation then was and always has been literature to the extent that the pursuit of literature was compatible with the exigencies of an exacting profession. Therefore, speaking to an august assemblage like the present, with an experience which is somewhat obsolete now, because the active practice of the profession is some years behind me, if I undertook to speak to you on the law or do what is even more daring, to expound unto you any legal subtlety, I shall be greatly daring and venturesome. It therefore occurred to me that I should strike the happy mean and speak as the gentleman who was asked to speak on "Chinese Metaphysics" did. Not knowing how to begin, he looked up the article on China in the Encyclopædia Britannica and also that on Metaphysics and combined the two into Chinese Metaphysics. Somewhat like that adventurous man I am going to speak to you on "Law and Letters" just now. But before I do so, I shall take you in retrospect to the giants of law here and elsewhere in India to whom it was given not only to be profound lawyers but also to be considerable men in matters appertaining to literary expression. In this Court we had Sir T. Muthuswami Aiyar, a person who owed everything to very carefully designed and disciplined self-education. That self-education involved not only the study of the law as expounded in treatises of English and Continental jurisprudence but also a study, painful, meticulous and exact, of the sonorous rhythms of the English language of the Victorian period. He began to learn these very late, but he mastered them. In his judgments you will find the style which was in vogue in those days, classical, somewhat ponderous but very accurate and expressive. His judgments in Hindu law cases, in cases connected with religious endowments and in various cases involving intricate points in Malabar law, were masterpieces. In them as in almost every other field of the law he brought to bear a cultural outlook while elucidating legal principles. In those days Judges had better chances than now of embarking on literary refinements because they had the leisure and the opportunities. It appears that in those days, on account perhaps of the lesser number of official and non-official reports and the absence of sudden and hasty delving into unreported judgments found in the record rooms for discovering apposite precedents, it was possible for Sir T. Muthuswami Aiyar to resort to great books and evolve first principles. He

was perhaps the most illustrious of the Madras Judges and he along with some others like Sir S. Subramanya Aiyar, Mr. Sundara Aiyar, Sir T. Sadasiva Aiyar and Sir C.V. Kumaraswami Sastri took trouble over their language. A galaxy of legal talent lent distinction to Madras and put it at least on a par with any other High Court. There were also Englishmen like Justices Turner and Innes and Holloway. Perhaps only next after Sir T. Muthuswami Aiyar came Sir S. Subramanya Aiyar. He was as emphatic in style as his very attitude and appearance, full of emotion and apt to be filled with generous impulses and occasional flashes of indignation. When he was able to get enough leisure, he wrote judgments which for their aptness of style and epithet ranked with the foremost examples of the juristic art. Then came many great men like Sir V. Bashyam Aiyangar to whom language was a painful necessity and a refractory instrument for expressing the subtlety of legal exploration; and the intricacies of the legal language were like hard granite to be chiselled out in sharp and often unornamental outline. Probably, in recent times, the greatest master of legal exposition in India was Mr. Justice Mahmood. Those who have read the Allahabad Reports of the early days know that, whether he dealt with adjective law and its relation to substantive law, or whether he spoke in relation to the idea of adoption of an only son, whether he expounded and quoted from the Islamic authorities or the Smrithis or whether he insisted upon the rights of individuals against the State, there was the lambent style and the force and dignity of exposition. Wherever his mind travelled, whatever his hand touched, he adorned with his sense of style, with his knowledge of the Sanskrit language which he learnt with great trouble, with his knowledge of Persian and Arabic and his culture in many European literatures which he owed to the very careful discipline he underwent at the instance of his great father. Justice Mahmood was an excellent example of the art of legal expression in apt language. Then we come to lawyers like Telang and Ranade and the Mitters and Gurudas Banerjea and Sir Ashutosh Mukerji, who, when they chose to, could and did write fine and expressive judgments. Sir Ashutosh was a master of many sciences and arts and he rose to such supremacy in the exposition of case-law that it did not matter to him very often whether he wrote exemplary English or not. But

when he wanted, he *could* write with vigour and terseness of expression and some of his judgments are specimens of good English. Perhaps Dr. Rash Behari Ghosh was facile princeps in India as a literary lawyer and in a rare degree there was united in him a thoroughness of many-sided culture and grasp of legal truth with the facility of happy expression for the like of which you must go to the great English, French and American Jurists. He was able to put legal principles in language at once accurate and illuminating. And of course, J.D. Mayne and his work on Hindu law cannot be lost sight of. But if one had to study good English, as well as good law, one could do no better than explore that wonderful mine—Moore's Privy Council Judgments. The Judges who presided over the Privy Council in the 19th century were giants of law and their language was always above criticism. They were very thorough and very accurate. But behind and above all that, there was a patient research and a freedom from turmoil, literary or legal, either imposed from within or from without, and an exposition which can be compared only with the best specimens of literary art.

Now, to go back to the beginning, I am going to address you for some time on Law and Letters, but before I do so let me recall to your minds one or two excerpts from those who have attempted a similar task. In order that I may not be behind the times, I have brought some of my authorities with me. But I may assure you that I have not followed my own previous example, especially when I was opposing my friends at the Bar like Mr. V. V. Srinivasa Aiyangar and Sir Alladi. I often used to keep my authorities underneath the table, to be used only as torpedoes in case of need.

Giving evidence before a Royal Commission, Lord Fitz Gibbon stated that "the knowledge of a lawyer is the acquiring of superficial knowledge quickly for use of a temporary kind". What he meant was this. As a lawyer one may have to deal with a nautical question to-day, and one may have to speak on the ocean currents. Mr. Justice Varadachariar, who is present here and who is in the midst of his Federal transmigration, may have very soon to listen to elaborate expositions of the conflicts between States jurisdiction and Central jurisdiction. I may have to make it appear before the judge that all my life I have been reading nothing but the nautical almanac and the principles of Hydrodynamics. To-morrow I may have to deal with medical

or engineering problems and exhibit a facile, if superficial, knowledge of technical minutiæ. All the time, moreover, the lawyer must be an apt commentator and a critic of language. The great point of the lawyer is that he must forget almost sooner than he learns, because if he keeps in his mind all that he learns, he will go mad. He must first of all appear to know all that he is talking about and secondly he must replace this temporary knowledge with other categories of learning. That is exactly what Lord Fitz Gibbon meant. The style of legal address now is very different from what it used to be. Even in my younger days there was not developed that very telegraphic and very utilitarian style which is forceful but not always elegant and which is characteristic of to-day. What is often done is simply to quote a few cases from out of reports and then ask for a judgment. The advocate on the other side quotes something else and the argument deals more with numerals and interjections than with exposition. In those days there were men like Mr. Norton who, although he unwillingly quoted authorities sometimes, always spoke sparkling English. Mr. Norton also often lost his cases by reason of his neatly expressed and sometimes stinging jokes. If it was possible to make a joke at the expense of a judge or a witness he could never refrain from it. It was from him that I first heard the witticism "The extreme penalty for bigamy is to have two mothers-in-law". He once repeated before a local court the historic joke of Curran, the great Irish lawyer who was speaking before a pretentious judge. The judge was dogmatic and said "Sir, if that is the law, I would burn my law books". Curran took the ball at the rebound and said "Why not read them, My Lord". I remember a similar remark being made by Mr. Norton in the Sessions Court to a particular judge. Naturally he lost his case. The present position is that a combination of what you might call literary excellence is not associated with the legal career because we are all in a great hurry now. We must finish a certain number of cases within a certain fixed period as Governments call upon the Courts to submit certain returns and the question of arrears arises. And further the multiplicity of reports and precedents is not conducive to a cultivation of individual style. It needs some leisure to be able to polish your phrases. When a lawyer of the old days was elaborately perorating on the doctrine of warranty and on the question of

damages when certain bags of oil-seeds were short-delivered, Justice Day said: "Yes; there may be full-bags and half-bags and also wind-bags". We are too afraid of the last criticism. Thus before the lawyer begins his *'alapana'* he is asked to be short.

Now, I propose to talk to you for a few moments of what has been the literary appraisal of the law, what the literary man has thought of the law and what the lawyer has been as a literary man. So far as the first portion is concerned, the task is very easy. The lawyer has too often been the butt of the author and the artist. It was decided—the case is referred to in a note in 14 Madras Law Journal at p. *272**—that the lawyer had a right to shed tears! The point arose in this way. The lawyer tried to argue. He made in his argument extravagant gestures and appealed to the jury. But the jury were obdurate. The question about his right to appeal to the sentiments and passion of the jury arose and it was decided after lunch that the shedding of a few well-chosen tears was not a contempt of Court. History does not chronicle the result. Similarly Lamb referring to the great Roman lawyers justified what may be called bringing the *corpus delicti* in the Court. The Romans used to wear a toga similar to our gowns. In a particular case the question related to infanticide and after the normal arguments in the case, the lawyer dramatically took the infant's body from beneath the folds of his toga and appealed to the Jury to acquit the accused because the infant was alive and kicking. The question was very simple for the Judges. These are instances used to show that the lawyer would go to any lengths to succeed in his cause.

In Chaucer we find the lawyer who is full of tricks. Then we come to Shakespeare who was a lawyer by instinct. Lord Penzance in a brochure has stated the reasons compelling him to the conclusion that Shakespeare must have been bred up in an attorney's office. As he knew so much about conveyances and not only the language, but the spirit of the law was so familiar to him, that Lord Penzance favoured the view that Bacon must have been the author of the Shakespearean dramas. But Lord Penzance apart, there is no question that speaking generally Shakespeare was not particularly partial to the lawyer. Portia in the Merchant of Venice, the first female lawyer in English literature was an exception but I

---

* The Lawyers Lachrymal rights.

am afraid was undoubtedly guilty of bad law. I am speaking subject to correction. Her pleading was entirely against the right theories of alienation and conveyance. The question arose in the case argued by her whether a person who had under a contract the right to cut off a certain portion of the flesh from the human body had a right to draw blood. Persons who know personal or real property law, know that whatever is given by means of a document, is given with all the necessary easements, benefits and appurtenances and the requisite blood and flesh must have passed together under the document. Anyhow Portia's bad law held the field and we have got it chronicled in one of the masterpieces of European literature. In Henry IV, Falstaff was guilty of the violation of the prohibition laws and he was admonished by the Lord Chief Justice. Falstaff was a great friend of the Prince of Wales and he boasted that the laws of England were at his beck and call. The Lord Chief Justice upheld the majesty of the law and condemned him to the *Fleet Prison.* This same Lord Chief Justice had proceeded against and sermonised Henry V when he was Prince of Wales, and for his action, instead of being dismissed as he well might have been, he was greatly praised by the then sovereign of the country. Barring then Portia in the Merchant of Venice and the Lord Chief Justice In Henry IV, Shakespeare practically treats a lawyer as a bad specimen of humanity. Generally speaking a lawyer in Shakespeare is a designing and rapacious person, although we lawyers know that he has never been so. Crabbe describes a lawyer as "a peacemaker who keeps in awe contending parties by threats of law." His is one of the sympathetic legal portraits but Justice Greedy in Massinger's "New way to pay old debts" is a typical picture of a hard-hearted and corrupt lawyer.

It is a very curious thing and the point is worthy of investigation by some research student that a man when he succeeds in the law, becomes a dry-as-dust person. At the same time it is true that many eminent literary men have approached the portals of the law but have not succeeded in getting entrance. Bacon, Macaulay and Sir Henry Maine are exceptional cases. Scott, Dickens, Thackeray and Boswell were confessed failures at the Bar. Disraeli, for instance, joined the Gray's Inn. But we find that he wrote to the authorities of the Gray's Inn that he was chronically ill and that he could not afford to

keep his name on the rolls and so his name was struck out. Seven years after Gladstone was enrolled, his other avocations were so engrossing that he could not pay attention to law and his name was removed. Thus two of the foremost Parliamentarians were unsuccessful barristers. Scott was, as is well known, a scrivener. He is the only man excepting Crabbe who has more or less uniformly written well of the lawyer and his Mr. Pleydell is one of the finest illustrations of the good, kind, benevolent and acute lawyer. Recently some of the great figures in politics have been successful lawyers as for example Asquith, Haldane, Llyod George, Birkenhead, Reading, Carson and Sir Edward Clarke, Simon.

When we come to later literature, there are Dickens and Thackeray. Dickens was a man who tried many things and he learnt a great deal of law by the force of circumstances. But of him it may be said that neither he nor Thackeray has been antipathetic or ungenerous to the lawyer. The attorney in Pickwick pretending friendship with the Lord Chancellor, Serjeant Buzfuz with his chops and tomato sauce, Serjeant Snubbin and many others are instances in point, as well as David Copperfield himself. In the continent the case is worse. In Moliere, Voltaire and Balzac we find the lawyer portrayed as a person full of wiles and tricks and greedy and unscrupulous. It is nevertheless an outstanding fact that very few persons of great eminence in European literature have been found to be without some grounding in the law. Robert Louis Stevenson, one of the most attractive of recent writers and a master of prose, attended some lectures in Roman Law in a Scottish University. Students of Roman Law know what emphyteusis and stillicide mean. The former is a kind of land tenure while the latter is an easement of necessity. Stevenson who attended these lectures summarises his knowledge as amounting to nil as he was not even certain whether emphyteusis was not a disease and stillicide a crime like matricide or fratricide. After having undergone this kind of legal apprenticeship Stevenson emerged as a polished writer of English prose and a splendid writer of ballads. I venture to attribute to his legal training, his accurate thinking and clear narrative. An American lawyer describes what legal culture, and legal training can do and what its value is. What he says is:

"Modern sermons, debates in the House, newspaper leading articles and correspondence have a certain note of pompous futility which point too

clearly to a growing lack of intellectual discipline and a sad ignorance of logic. The law Courts at least preserve a sort of intellectual gymnasium the efficiency of which is perhaps best advertised by the objurgations of those who wish to solve every political problem by the short cut of violence."

Whether it is for a life of letters or for a life devoted to the arts, a legal training, the habit of marshalling your ideas, the habit of putting first things first and last things last, the habit of analysis and the habit of classification have got their undeniable advantages. Legal knowledge is of the utmost value in the conduct of public and administrative life. Lord Haldane is an illustrious example in recent times. He combined in himself a profound knowledge of philosophy, of law and letters and he was further a man of action in the real sense of that term. He it was who reorganised the English Army amidst obloquy and calumny until at last he was practically hounded out of his place in the Cabinet. It took ten years for the people to realise his great services but he surely owed to the law that versatility and that strenuousness which enabled him to familiarise himself with military matters and to prepare England for the War of 1914. To him these lines of Kipling may well be applied:

" If you can dream and not make dreams your master
" If you can think and not make thoughts your aim
" If you can meet with triumph and disaster
" And treat those two impostors just the same," etc., etc.

To obtain such an outlook, legal training is a great aid. We have very little evidence in ancient Indian literature as to the place of the law and the training of the lawyer and his position in the polity of the different ages, but we have glimpses here and there of the value attached to immutable law. The idea of Ṛitha, the idea of Dharma, were ideas akin to the fundamentals of the Roman Law. The deity is regarded essentially as a law-giver and often an omnipresent witness. Let me bring to your mind what the Atharva Veda says:

यस्तिष्ठति चरति यश्च वञ्चति यो निलायं चरति यः प्रतङ्कम् ।
द्वौ संनिषद्य यन्मन्त्रयेते राजा तद्वेद वरुणस्तृतीयः ॥

" Who stands, who moves, who goes crookedly, who goes stealing this way, who lives desparately, what two, sitting together, conspire (all) that, Varuna, as the third knows."

In Greece and Rome law and life were interdependent and the idea of law as the energising, fertilising element in all true culture was ever present. Cicero, Demosthenes and the great jurists who found the Jus Civile were the progenitors of Machia-

velli, Grotius, Puffendorff and Savigny and of Napoleon's Code; and the glory of Rome is that law and the practice of the law went hand in hand with oratory and the sedulous cultivation of style in the spoken and written word.

So far as we are concerned, our Dharma Sastras and later on the great Smrithis and still later Kamandakeeya, Kautalya's Artha Sastra—all these were not great works of literary art, but they developed a special style of their own—succinct and clear and free from ornament or floridity.

In Greece, thanks to the circulation of public offices, everybody in the City States may be plaintiff, everybody was likely to be defendant and everybody had to be a Judge. The link between law and letters was profound, intense and continuous. Nowadays there is not much reference either to Demosthenes or Cicero and so I shall, with your leave give you an idea of the kind of arguments which were heard in those days. I may instance Demosthenes' Orations against Philip of Macedonia which gave rise to the term Phillipic. Here is an example:

"As to the defeat, that incident in which you so exult! (accursed wretch! who should rather mourn for it!). Look through my whole conduct, and you shall find nothing there that brought down this calamity on my country. Let it be considered that there is no one instance in which the ambassadors of Macedon ever prevailed against me, in any of those states where I appeared as the ambassador of Athens—not in Thessaly, nor in Ambracia, nor in Illyria, nor among the Thracian princes, nor in Byzantium, in no one place; no, nor in the last debate at Thebes But whatever was thus acquired by my superiority over the ambassadors of Philip, their master soon recovered by force of arms. And this is urged as my offence. My adversary, even at the very time that he affects to ridicule my weakness, is so shameless as to require, that I in my single person should conquer all the powers of the Macedonian, and conquer them by words. What else could I command? I had no power over the life of any one citizen, over the fortune of our soldiers, or the conduct of our armies, for which thou art so absurd as to call me to account. In every particular where a minister is accountable, there let your scrutiny be strict and severe I never shall decline it. And what are the duties of a minister? To watch the first rise of every incident; to foresee; to forewarn his fellow citizens. And this did I perform. To confine those evils within the narrowest bounds, which are natural and necessary to be encountered in every state; to restrain the fatal influence of irresolution, supineness, prejudice, and animosity; and, on the other hand, to dispose the minds of men to concord and unanimity, to rouse them to a vigorous defence of their just rights. All this did I perform; nor can an instance be produced in which I proved deficient. If a man were asked what were the means by which Philip effected most of his designs; the answer is obvious: It was by his armies, by his bribes, by corrupting those who were at the head of affairs. As to his armies, I neither commanded nor directed them. I am not, therefore, to account for any of their motions. As to his bribes, I rejected them. And in this I conquered Philip; for, as the purchaser conquers when a man accepts his price,

and sells himself; so, the man who will not be sold, who disdains to be corrupted, conquers the purchaser. Well, then, with respect to me, this state remains still unconquered.

His oration on the Crown was an attempt made by him to accomplish the union of Greece for the defence of independence. Here is another example:

"There are two distinguished qualities, Athenians, which the virtuous citizen should ever possess (I speak in general terms, as the least invidious method of doing justice to myself) a zeal for the honor and pre-eminence of the state in his official conduct; on all occasions, and in all transactions, an affection for his country. This nature can bestow. Abilities and success depend on another power. And in this affection you find me firm and invariable. Not the solemn demand of my person; not the vengeance of the Amphictyonic council, which they denounced against me; not the terror of their threatenings; not the flattery of their promises; no, nor the fury of those accursed wretches whom they aroused like wild beasts against me could ever tear this affection from my breast. From first to last, I have uniformly pursued the just and virtuous course of conduct; assertor of the honors, of the prerogatives, of the glory of my country; studious to support them, zealous to advance them, my whole being is devoted to this glorious cause. I was never known to march through the city with a face of joy and exultation at the success of a foreign power; embracing and announcing the joyful tidings to those who, I supposed, would transmit it to the proper place. I was never known to receive the successes of my own country with tremblings, with sighings, with eyes bending to the earth, like those impious men who are the defamers of the state, as if by such conduct they were not defamers of themselves; who look abroad, and, when a foreign potentate hath established his power on the calamities of Greece, applaud the event, and tell us we should take ever[illegible]ans to perpetuate his power.

"Hear me, ye immortal g[illegible]! let not these their desires be ratified in heaven! Infuse a better spirit into these men! Inspire even their minds with purer sentiments! This is my first prayer. Or, if their natures are not to be reformed; on them, on them only discharge your vengeance! Pursue them both by land and sea! Pursue them even to destruction! But to us display your goodness in a speedy deliverance from impending evils, and all the blessings of protection and tranquillity!"

Cicero in his orations against Catiline and Marcus Antonius and in defence of Mylos has afforded wonderful examples of forensic eloquence. Prosecuting Verres for criminal breach of trust he indulges in the following language:

"Oh, for the good faith of gods and men! What is the meaning of all this? What a cause is this? What impudence is this? The statues which I am speaking of, before they were taken away by you, no commander ever came to Messana without seeing So many praetors, so many consuls as there have been in Sicily, in time of peace, and in time of war; so many men of every sort as there have been—I do not speak of upright, innocent, conscientious men, but so many covetous, so many audacious, so many infamous men as there have been, not one of them all was violent enough, or seemed to himself powerful enough or noble enough, to venture to ask for, or to take away, or even to touch anything in that chapel. Shall Verres take

away everything which is most beautiful everywhere? Shall it not be allowed to any one besides to have anything? Shall that one house of his contain so many wealthy houses? Was it for this reason that none of his predecessors ever touched these things, that he might be able to carry them off? Was this the reason why Caius Claudius Pulcher restored them, that Caius Verres might be able to steal them? But that Cupid had no wish for the house of a pimp and the establishment of a harlot; he was quite content to stay in that chapel where he was hereditary; he knew that he had been left to Heius by his ancestors, with the rest of the sacred things which he inherited; he did not require the heir of a prostitute. But why am I borne on so impetuously? I shall in a moment be refuted by one word. 'I bought it', says he. O ye immortal gods, what a splendid defence! We sent a broker into the province with military command and with the forces, to buy up all the statues, all the paintings, all the silver plate and gold plate, and ivory, and jewels, and to leave nothing to anybody. For this defence seems to me to be got ready for everything; that he bought them. In the first place, if I should grant to you that which you wish, namely, that you bought them, since against all this class of accusations you are going to use this defence alone, I ask, what sort of tribunals you thought that there would be at Rome, if you thought that any one would grant you this, that you in your praetorship and in your command bought up so many and such valuable things—everything, in short, which was of any value in the whole province."

So far I have been discussing what may be called the general reaction of literature on law. Now, I propose to conclude what I have to say with the mention of some of the great lawyers who have produced things which are worth reading and what are contributions to literature "properly so-called." The first of them, so far as England is concerned, is Sir William Blackstone to whom fine tributes have been paid by Fox and Gibbon and Lord Mansfield and of whom Bentham said that he was the first man who taught Jurisprudence to speak the language of the scholar and gentlemen. One of his most illustrious disciples was Abraham Lincoln. Another was Austin to whom we owe a treatise which is more thorough than beautiful but which has had a profound influence on law and society. Next comes Jeremy Bentham himself. He was responsible for a tremendous stimulus to legal reform and as Sir James Fitz James Stephen said, his rationale of evidence was a shell bursting in a power machine. His influence on writers like Bryce was very great. Smith's Leading Cases, although not a great literary treatise, brought home to lawyers in England the underlying principles of the law and this treatise was the precursor of Story and Marshall.

An English politician and lawyer of the 18th century called Arbuthnot wrote a book entitled "Law, a Bottomless Pit". It was a kind of pamphlet in which he denounced an impending

war against France. It was one of the very first treatises on international peace and is remarkable also for its literary quality. Nicholas Frog, John Bull, and Lewis Baboon typifying France, England and Holland are represented as litigants who spent all their money in a law suit. "A lawyer without history of literature is a mechanic, a mere working mason. If he possesses some knowledge of these he may venture to call himself an architect". These are the words of Pleydell, the most attractive lawyer portrayed in Scott's Waverley Novels. One of the greatest literary lawyers in England was Sir Thomas Moore, the writer of Utopia. He outlined doctrines of political economy which are very different from some of the doctrines which are now current in the world and that book is worth studying on the doctrine of politics as well as in what may be called the art of writing simple and cogent English. Then, of course, we have one who has been called the greatest and meanest of men and who was at his best as a writer when he was under trial for corruption and bribery—Francis Bacon. His speeches in defence of the charges against him are literary gems, and his Essays stand in a class apart. May I quote just a few words showing legal English at its best—concise, clear, inspired and suggestive:

"Preserve that right of thy place, but stir not questions of jurisdiction; and rather assume thy right in silence, and *de facto*, than voice it with claims and challenges. Preserve likewise the rights of inferior places; and think it more honour to direct in chief than to be busy in all."

"The vices of authority are chiefly four: delays, corruption, roughness, and facility. For delays give easy access; keep times appointed; go through with that which is in hand, and interlace not business but of necessity. For corruption, do not only bind thine own hands or thy servant's hands from taking, but bind the hands of suitors also from offering; for integrity used doth the one; but integrity professed, and with a manifest detestation of bribery, doth the other; and avoid not only the fault, but the suspicion. Whosoever is found variable, and changeth manifestly without manifest cause, giveth suspicion of corruption; therefore, always when thou changeth thine opinion or course, profess it plainly and declare it, together with the reasons that move thee to change, and do not think to steal it. A servant or favourite, if he be inward and no other apparent cause of esteem, is commonly thought but a byeway to close corruption. For roughness, it is a needless cause discontent; severity breedeth fear, but roughness breedeth hate. Even reproofs from authority ought to be grave, and not taunting. As for facility, it is worse than bribery; for bribes come but now and then; but if importunity or idle respects lead a man, he shall never be without: as Solomon saith: 'To respect persons is not good; for such a man will transgress for a piece of bread'!"

His was probably the finest example of legal writing. It is wonderful to contemplate that confronted with implacable adversaries and in the midst of turmoils he was able to hew his words and chisel his phrases. Lord Clarendon the historian and the friend of Ben Johnson and Seldon, Lord Jeffrey who edited the Edinburgh Review, and attacked impartially Wordsworth, Keats, Byron and Scott, Lord Brougham who has been caricatured by Samuel Warren in Ten Thousand a Year and by Peacock were other notable literary lawyers of whom the latest were Lords Campbell, Selbourne, Coleridge, Macnaughten and Darling. Lord Mansfield one of the brightest ornaments of the English Judiciary was the founder of the English Commercial law and the 'Law Merchant' as Lord Stowell was the founder of Maritime law. Both in his judgments and in his *obiter dicta* you will find finished examples of clarity of expression and elegance of thought. Mansfield was one of the greatest of English orators and his speech on the Right of Taxing America is a classic. Abraham Lincoln, Daniel O'Connell, Patrick Henry and Daniel Webster, in addition to being great lawyers were also some of the greatest orators who used the English language. I do not know whether any of you have read O'Connell with regard to the rights of the Catholics. He has displayed not only profound knowledge of the law but oratory the like of which has not been often heard in England if we except the speeches of Burke and Sheridan. Then we come to Macaulay who, in addition to being an orator, was also an administrator and was responsible for a piece of splendid codification—the Indian Penal Code—a good example of accurate and cogent English prose. In the continent wherever there is codified law there seems to be much more scope for great eloquence. It is worthy of remark that the French and generally speaking the continental legal system as well as the American Courts have tended to produce great and impassioned advocates and stylists. Great as have been the contributions of Hardwicke, Erskine, Romilly, Cockburn, Herschell, Cairns, Selborne, Halsbury, Lushington and Birkenhead in some of the Prize Court cases and Bowen and Fletcher Moulton in some of their notable judgments they are eclipsed by Lincoln, Henry, Ames, Story, Webster, Choate and the French and Spanish advocates of whom one of the most eminent was Senor Castelar whom Gladstone called the greatest orator he had heard next to Mrs. Annie Besant. The greatest specimens

of English eloquence are perhaps to be found in the writings and the speeches of the American orators and in the judgments of Chief Justice Marshall and Justices Story and Holmes. I would like to invite special attention of members present here to Webster's reply to Hayne dealing with the limits of the jurisdiction of the State Government and the Central Government.

Thus, therefore, we find that so far as Europe and America are concerned, whereas men of letters have been rather jealous of the law and whereas they have been using the lawyer as a butt and as a victim of caricature, as enemies or at the best as parasitic members of society, the lawyer and the Judge have made great contributions both in judgments and philosophical thought to the onward march of the oratorical and literary procession in both the countries. I can claim therefore that law and letters have been intermingled in the history of the world. All through the history of the world there have been lawyers and judges who by their knowledge and practice of literature have enriched what may be called the idioms and the genius of their several languages in addition to enriching the legal lore of the countries. Long may law continue as the handmaid or rather the familiar companion of the arts and literature so that law as a philosophy of life, as a balancing force in human existence and as a regulating and dynamic factor in human society may not be divorced from but may be united with all varieties of that basic and essentially spiritual ideal which beautifies, enlightens and ennobles human life.

SUMMARY OF ENGLISH CASES.

In re CLEADON TRUST, LTD., (1939) 1 Ch. 286.

Company—Advance of money for benefit of company—Liability of company to the person advancing.

The secretary of a company wholly without authority procured one of the directors to provide money to pay to persons who were entitled to the payment of the moneys from a subsidiary company. The company had given guarantees to the payees and the effect of the provision of money by the director was, the debt so guaranteed was discharged and on the date of the liquidation the guarantee had ceased to be operative. A resolution by directors confirming the advances was bad for want of *quorum*. The present application

was by the director to rank as a creditor for the sums advanced. Bennet, J., rejected the application in 1938 Ch. 660. On appeal,

Held (per *Scott* and *Clauson*, *L.JJ.*, *Greene, M.R.*, dissenting), the mere fact that the applicant made payments which enured to the benefit of the company did not establish an equity in his favour against the company to have recoupment from their funds.

In re KAY'S SETTLEMENT: BROADBENT *v.* MACNAB, (1939) 1 Ch. 329.

Settlement—Covenant for settlement of after-acquired property—Beneficiaries if volunteers—Trustees if can compel specific performance or recover damages.

The trustees of a voluntary settlement asked for directions whether they shall take any and if so what proceedings to compel the performance by the settlor of a covenant contained in that settlement or to recover damages for failure to implement the covenant.

Held, the beneficiaries were volunteers with no right to obtain specific performance of a mere covenant. The trustees should not take any steps either to compel performance of the covenant or to recover damages through the settlor's failure to implement it.

SHARPE *v.* TOPHAMS, LTD., (1939) 1 Ch. 373.

Company—Right of member to obtain split share certificates.

Held, on a construction of the articles of association, that a shareholder is entitled to call for his certificate to be split.

CARPENTER *v.* EBBLEWHITE AND OTHERS, (1939) 1 K.B. 347.

Practice—Third party procedure—Claim against owner of motor car for negligent driving—Insurance Company added as third party—Possible liability of plaintiff—Declaration if can be made—If will embarrass the trial.

The plaintiffs were injured in a collision between their motor-cycle and a motor-car, registered in the name of *E* one of the defendants, driven by *B* the other defendant. The plaintiffs alleged that *B* was the servant or agent of *E* or in the alternative. *E* permitted or authorised *B* to drive the car and that the accident was due to the negligent driving by *B* for which *E* was liable. Plaintiffs were allowed to add *E's* insurers as a defendant. Plaintiffs then in the original statement of claim asked for a declaration against the insurance company that it is obliged to satisfy any judgment obtained by any of the plaintiffs against *E* or *B*. The defendants took out a summons to strike out the statement of claim relating to the insurance company as disclosing no reasonable cause of action

and being vexatious and embarrassing and *E* gave evidence that the car had been sold before the accident to *B* and the insurance company claimed that as *E* had sold the car and they had not insured *B*, they were not concerned with the matter as insurers of either *E* or *B*.

Held, the statement of claim for declaration ought to be struck out.

Per *Greer, L.J.*—The claim against the insurance company ought not to be entertained as there was not yet in existence any dispute between the parties on the only question between them and it will be embarrassing.

Per *Slesser, L.J.*—The disclosure to the jury of the defendants insurance might tend to prejudice or embarrass the fair trial of the action.

Per *MacKinnon, L.J.*—The right to make declarations is discretionary and the right is primarily designed to deal with declarations of liability on questions of law. There is no question of law as to possible liability of the insurance company.

GREENWOOD *v.* ATHERTON, (1939) 1 K.B. 388.

Public Authorities Protection Act (1893), *S.* 1—*Managers of a non-provided school—If public authority.*

The managers of a public elementary school governed by Education Act (1921) in providing and controlling a playground (where an accident occurred to the plaintiff) were acting in pursuance or execution of the Education Act and an action not commenced within the time limited by the Public Authorities Protection Act for damages for accident must fail.

OWENS *v.* LIVERPOOL CORPORATION, (1939) 1 K.B. 394.

Tort—Mental or nervous shock—Right to recover damages—If apprehension of injury to human safety necessary.

A hearse carrying a coffin containing a corpse was followed by a carriage in which were the plaintiffs who were the mother of the deceased, an uncle, a cousin, and the cousin's husband. A tramcar negligently driven by a servant of the defendant collided with the hearse and overturned the coffin. In a claim for damages for negligence against defendants it was found that "the plaintiffs did receive injuries in the nature of shock to a varying degree from the actual sight of damage to the hearse containing the body of a near relative" but the action was dismissed on the ground that in law there must be apprehension of injury to a human being, or actual sight of injury to a human being before a plaintiff can recover damages. On appeal,

Held, the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved and the plaintiffs are entitled to damages. One who is guilty of negligence must put up with idiosyncracies of his victim that increase the likelihood or extent of damage to him (damages of 75*l.* for the mother, 15*l* for the uncle, 100*l.* for the cousin and 11*l.* for the cousin's husband were allowed).

INLAND REVENUE COMMISSIONERS *v.* KERED, LTD., AND OTHERS, (1939) 1 K.B. 402.

Income-tax—Surtax—Finance Act (1936) *S.* 20, *sub-S.* (4) (*b*) *—Actual gross amount expended in discharge of loan capital of company—If can be apportioned to loan creditors—If more than the sum due on the loan can be apportioned to such creditors if income of company is sufficient.*

Where the question arose whether the special commissioners can apportion to loan creditors the gross of the actual amount of income which has been expended in discharge of their loan capital and whether they can apportion to such loan creditors more than the sum due on the loan if the income of the company is sufficient,

Held, the natural meaning of the sub-section is that the commissioners can apportion to loan creditors the actual amount expended or which might have been expended in redeeming their loan capital and the commissioners cannot apportion to the loan creditors more than the sum due on the loan.

CHISHOLM *v.* LONDON PASSENGER TRANSPORT BOARD, (1939) 1 K.B. 426.

Tort—Contributory negligence—Pedestrian crossings—Collision—Defendant's driver guilty of breach of statutory duty—Plaintiff's contributory negligence.

Plaintiff stepped from the kerb on to a pedestrian crossing on a road a short distance in front of defendants' bus, the driver of which was unable to avoid a collision with plaintiff and the plaintiff was injured.

Held (*Scott* and *MacKinnon, L.J., du Parcq, L.J.,* dissenting), distinguishing *Bailey* v. *Geddes*, (1938) 1 K.B. 156, if a pedestrian suddenly steps on to an empty crossing so as to embarrass a car which has come quite close and thereby causes or contributes to a collision he has only himself to blame and the driver is under no liability to him for the consequences. The breach of statutory regulation by the defendant does not bar the defence of contributory negligence.

BAILEY *v.* HOWARD, (1939) 1 K.B. 453.

Tort—Damages for loss of expectation of life.

In an action by the father, as personal representative, for damages for loss of expectation of life of his daughter aged three the jury awarded £1,000. On appeal,

Held, the net result of the cases is that it is left to the appreciation of the jury to fix a figure and the amount to be given should be strictly reasonable and if it errs at all it should err on the low side. The damages recoverable by the personal representative is not reduced by the death of the victim.

KEARRY *v.* PATTINSON, (1939) 1 K.B. 471.

Tort—Conversion—Plaintiff's bees escaping into defendant's garden—Plaintiff's right to follow—Extent—Bees if chattels—Claim for conversion—Sustainability.

Plaintiff's bees escaped into defendant's land and defendant refused the plaintiff entry on his land for recovering the bees. The bees were lost. In a claim for the value of the bees lost,

Held, bees are *feroe naturae.* When hived they are taken into disposition of the owner and became his property and remain his property, so long as they are in his sight and he has legal power to pursue them. When the bees escape from plaintiff's land the right to follow ceases and until hived again, cannot be considered to be anybody's chattel. Therefore no action can be maintained for conversion.

HIBERNIAN BANK, LTD. *v.* GYSIN AND HANSON, (1939) 1 K.B. 483.

Bill of exchange—Payable three months after date to order of payee only—"Not negotiable" written across—Effect on negotiability.

The bill was drawn by the Irish Casing Co., Ltd., upon and accepted by the defendants payable at Barclay's Bank. The bill provided that three months after date to the order of the Irish Casing Co., Ltd., only, the sum of £500 effective value received shall be the sum payable and across it were written the words "not negotiable". The plaintiff claimed as holders for full value. The payee owed the acceptor a larger sum on the due date which they claimed to set off. The bill when presented was dishonoured. The acceptors pleaded that the holders had no title to sue as the bill was not negotiable.

Held, the instrument remains a non-negotiable instrument drawn by the Irish Casing Co., Ltd., and accepted by the defend-

ants but limited as to the effect as between those two parties and it is not transferable.

(1938) 2 All.E.R. 575, affirm.

SIMONS *v.* SIMONS, (1939) 1 K.B. 490.

Foreign decree of divorce a nullity for want of jurisdiction—Order for payment of maintenance by such decree—If enforceable.

Where a decree, whether for dissolution of marriage or for nullity is made without jurisdiction an order for maintenance falls with the decree. If the main order goes, then any order which is merely ancillary to that order should go with it.

COHEN *v.* LESTER (J.), LTD., (1939) 1 K.B. 504.

Moneylenders Act (1927), S. 6—Moneylender—Money lent on security of jewellery deposited—Contract unenforceable owing to non-compliance with S. 6 of Moneylenders Act—Borrower's right to return of jewellery without payment.

Plaintiffs borrowed from defendants who were registered moneylenders, on the security of some jewellery which she deposited with them. The contract and security were unenforceable owing to non-compliance with provisions of s. 6, Moneylenders Act and plaintiff claimed a return of the jewellery.

Held, the defendants are not entitled to keep the jewellery and enforce payment. A distinction must be drawn between a contract which was illegal [as in (1907) 1 Ch. 302] and a case like the present where the contract is unenforceable.

DANN *v.* HAMILTON, (1939) 1 K.B. 509.

Negligence—Consent—When and how far a defence.

Plaintiff voluntarily became a non-paying passenger in a car and even after knowledge that the driver was not sober and in spite of opportunities to get down continued to travel in the car. In an accident that followed the driver was killed and the plaintiff injured. In a claim for damages by the plaintiff against the widow of the driver under Law Reform (Miscellaneous Provisions) Act, 1934,

Held, that the plaintiff did not impliedly consent to or absolve the driver from liability for any subsequent negligence on his part whereby the plaintiff might suffer harm.

THE NORDBORG, (1939) P. 121.

Conversion—Shipowner and consignee—Consignee taking delivery of goods in excess of what was covered by bills of lading—If shipowner can claim value of the goods over-delivered.

Consignees under 11 bills of lading claimed against shipowners for short delivery of timber under 4 bills of lading. The shipowners counter-claimed the value of 362 pieces of timber not covered by the 11 bills of lading delivered to the consignees.

Held, consignees were not liable to shipowners in tort for conversion. As between shipowner and consignee whether by implication of law or by way of inference from facts, the acceptance by the latter of the over-plus of itself does not give the shipowner a right to anything more than the payment of additional freight.

BUSH *v.* BUSH, (1939) P. 142.

Divorce—Desertion—Pendency of previous petition for divorce—Effect on desertion.

It is impossible for a wife to allege that desertion continues during the period in which she herself is presenting a petition for dissolution on the charge of adultery.

GIBBS-SMITH *v.* GIBBS-SMITH, (1939) P. 170.

Desertion—Unserved petition for divorce—If suspends period of desertion.

There was desertion by the husband from July, 1932, subject only to the fact that on 27—8—1935 the wife filed a petition for divorce. The petition was not served and dismissed on 1—7—1938 on the wife's application. The question was whether or not the filing of that petition had the effect of suspending the desertion for three years which would otherwise have been completed.

Held, distinguishing *Marthews* v. *Marthews,* (1938) 4 All. E. R. 377 and *Walton* v. *Walton,* (1938) 4 All.E.R. 382, the mere filing of a petition not followed by service does not suspend the obligation between the spouses to cohabit and therefore it had not interrupted the desertion.

JACKSON *v.* JACKSON OTHERWISE PRUDOM, (1939) P. 172.

Matrimonial Causes Act, 1937, *S.* 7—*Respondent alleged to have been pregnant at the time of marriage not by the petitioner—Husband if precluded from giving evidence as to non-access before marriage.*

In a petition for decree of nullity alleging that the wife was pregnant at the time of the marriage by a person other than the petitioner,

Held, the husband may give evidence that he was not the father of a child conceived before marriage.

Rule in *Russel* v. *Russel,* (1924) A.C. 687, not applicable.

JOTTINGS AND CUTTINGS.

Our Young Judges.—"It is an unfortunate habit of Attorney-Generals", Sir Edward Clarke once jocularly observed at an annual meeting of the Bar, "to continue to fill for some time the place to which they had been appointed. All good Attorney-Generals, when they died officially, went either to the House of Lords or the Appeal Court. But they delayed going there."

Now the Law Officers have good cause for the delay. I know not whether you have observed it, but from the Law Lords downwards our superior judges are remarkably if not phenomenally young; there is not what you would call an old man amongst them. Not often in our island history has there been a time when a disappointed but reasonable man could not legitimately jeer at the senility, deafness or other doddering symptoms of at least one member of the highest judicial tribunal. But look at it now. The oldest in years of the Law Lords are Lords Romer and Atkin, very youthful people, aged 72 and 71 respectively, and the average age of the seven no more than 67. Humphreys, J., is the only one in the K.B., who has attained the age of 70—he is only 71. Asquith, J., is a stripling of 48. Not one of the L.Js. has 70 summers to his credit; Crossman, J., eldest of the Chancery Division, is only 68, seven years more than his nearest contemporary, Bennett, J. The President of the P.D. and A. Division is less than 60, and the oldest Judge in his Division is a young fellow of 63, Henn Collins, J. I say nothing of Hodson, J., aged 43 years.—*L.J., 1939, p. 239.*

Pre-War Appointments.—As touching appointments and promotions, I have before me an announcement made in March in the fourth year before the last war, as follows: "The King has been pleased to confer the dignity of a Baron of the United Kingdom upon the Right Hon. Sir John Charles Bigham, on the occasion of his resignation of the position of President of the Probate, Divorce and Admiralty Division of the High Court of Justice. His Majesty has also been pleased to approve the appointment of Sir Samuel Thomas Evans, K.C., to be President of the Probate, Divorce and Admiralty Division in the place of the Right Hon. Sir John Charles Bigham. The King has further been pleased to approve the appointment of Mr. Rufus Daniel Isaacs, K.C., to be Solicitor-General, in place of Sir Samuel Thomas Evans, K.C."

Therein are two examples of rapid transition or promotion which surprised the Bar of that day. Sir John, who became Lord Mersey, had been only a short time in the President's seat. According to a legal correspondent of that day he "had only just settled himself comfortably in his new saddle, and, to go on with, he was not ripe for a peerage, inasmuch as he had not served the 15 years which entitles an ex-judge to a pension". He had been appointed Judge

of the Q.B.D. in 1897, after sitting for two years as M.P. for the Exchange Division of Liverpool, and "he did a great deal of useful work in the Commercial Court and in the Railway and Canal Commission. Though there were those who criticised the rapidity of his methods, nobody was surprised when, shortly before the resignation of Sir Gorell Barnes, he was invited to sit in the Court of Appeal as the temporary colleague of the Lords Justices".—*L J., 1939, p. 239.*

When Lord Reading Recame S.G.—"But when Sir John Bigham succeeded to the Presidency", it was written, "the profession was frankly astonished. His experience and his temperament did not appear to qualify him for his new position. During the short time he has sat in the P.D. and A. Division he has, however, proved himself strong, adaptable and a man of strong common sense". His retirement was due to ill-health, and on that ground he received the full judicial pension.

The promotion of Sir Samuel Evans to the Presidency was regarded as more remarkable. "A first-rate Parliamentarian, he was never in that charmed circle of advocates, one or all of whom are retained when a *cause celebre* is in the making. Such London business as he had in the Courts was mostly in connection with labour disputes, trades unions and the like work, that is to say, of Welsh origin. Had it been necessary for him to return to the Bar he would doubtless have figured in the society and sensational cases that the public loves; most law officers do so. But he would have had to win his spurs. And he will have to win them in the Probate, Divorce and Admiralty Division, for he knows as little of divorce as did Sir John Bigham, and as little of Admiralty as did Sir Bargrave Deane".

Over the promotion of Mr. Rufus Isaacs there was "nothing but rejoicing. For many years he has held a unique position at the Bar. With none of the glory which hedges a former law officer, he has more than held his own with all comers, and his professional income has probably been larger than that of any practitioner of modern times. As a forensic speaker and as the arguer of a point of law he has no superior; and there is no branch of litigation with which he is not familiar".—*L.J., 1939, p. 240.*

Juries must be True.—Not the legal knowledge of Sir Gerald Dodson nor the intent of the words used by him in directing the jury in the case of *R.* v. *Mills* was the reason why the conviction in that case was quashed in the Court of Criminal Appeal. As the L.C.J. observed, there could be no doubt as to what the Recorder intended to convey to the jury, but he "had used one or two perilous phrases which might conceivably have caused some members of the jury to incline their minds to a wrong view". That judgment of Lord Hewart and his observations on the Importance of Real Agreement among Jurors will rank amongst others of his judgments as

one of the classics of our legal literature: a great principle greatly expressed. He said, *inter alia*. "It is fundamental that a jury should not be led, from a desire to acquiesce, or to avoid eccentricity, or to save time and trouble, to represent themselves as holding a view which they do not hold. Their verdict must be a true verdict given according to the evidence; not an untrue verdict according to someone's actual or supposed convenience".

Good stuff and true; indicating how the judicial words should be safe and sound and free from peril in any direction to any jury. But what worlds of speculation are left open as to how juries, however well-directed, do so often return a unanimous verdict. Can 12 men, or a mixed company of 12 men and women, ever or often agree about anything? There is a general feeling or belief that the twelfth man, or may be the eleventh and twelfth members, are rarely convinced, and that if the moral suasion of the majority were not overwhelming in its persuasiveness, re-trials would be far more numerous than they are. Still, that is matter for the jury, and we may not peep at the secret process whereby unanimity is so oft achieved.—*L.J., 1939, p. 240.*

Agreement and Feeding of Jurors in Olden Times.—When the 12 jury members of to-day are unable to agree upon their verdict they are discharged with no greater penalty than a sarcastic remark from the learned Judge. It was not ever thus. Time was when a refractory juryman was committed to prison and the verdict of the 11 was taken. It was in the reign of King Edward III that the judges decided that a majority verdict was a nullity, and recommended that the judges of assize should carry the jury about with them in a cart till they should agree.

The rule that jurors should go without meat or drink until a verdict was given is of remote antiquity; but in Tudor times it was relaxed to the extent that if a juror became faint for lack of food he might, by the assent of the justices, "have meat and drink and also such other things as may be necessary for him; and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so agree, or by the assent of the justices, may both eat and drink". By this means the spectacle, maddening to the starving 11, of a twelfth juror enjoying his victuals, was avoided.

In the days of Queen Elizabeth, according to Smith's *Commonwealth*, it was usual for the successful party to entertain the jury after the verdict had been recorded. "The party with whom they have given their sentence giveth the Enquest a dinner that day most commonly, and this is all they have for their labour".—*L.J., 1939, p. 240.*

Concerning Fees.—A story has come down to us from a past generation of an old member of the Profession who, when a friend

commented on the fact that he appeared to own a very large number of cats, explained that the reason was that he liked everything of the fe(e)line species. The joke may not have been very subtle, but it is a good-natured jest at the supposed penchant for fees which is said to be one of the characteristics of the legal Profession, but by no means confined to it. Milton, it may be remembered, in his Tractate on Education, comments severely on this failing, as he would call it, of lawyers by referring to those who are allured "to the trade of Law, grounding their purposes not on the prudent and heavenly contemplation of justice and equity which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions, and flowing fees". To be sure the great Puritan poet administered his reproofs all round, but this one, with its mouth-filling phrases, has every now and again been thrown at the heads of our Profession as marking them out as mercenary beyond others. As we all know, the love of fees, fat or lean—usually the latter in fact come—has been no monopoly of the legal Profession, but at the same time the subject of lawyers' remuneration at different epochs is one of considerable interest, and has engaged the attention of several of the older writers—Foss, among others, in his stately row of volumes, and John Cordy Jeaffreson, himself a member of the Bar, in his interesting work, A Book about Lawyers published some seventy years ago, but still making pleasant reading.—*L.T., 1939, p. 233.*

Variations in Money Value.—With regard to lawyers' fees, as with everything else, they were paid in the old days on a scale very different from that in more recent times owing to the divergent value of money prevailing. To take an example, we read that in the year 1500 the Corporation of Canterbury paid for advice regarding their civic interests 3*s.* 4*d.* to each of three serjeants, and 6*s.* 8*d.* to the Recorder of London as a retaining fee. In 1505 the Goldsmiths' Company paid Serjeant Wood a fee of 10*s.*, and apparently this was regarded as a fairly reasonable fee at that date. According to one writer it was customary during the sixteenth century for clients to provide food and drink as well as fees for their counsel. Foss preserves the following items from an old bill of costs: "For a breakfast at Westminster spent on our counsel, 1*s.* 6*d.*"; and "To another time for boat hire in and out, and a breakfast for two days, 1*s.* 6*d.*" Breakfasts were obviously very moderate in price in those far-off days, a fact which is also borne out by an entry in the parish books of St. Margarets, Westminster, which contain this item: "Also paid to Roger Fylpott, learned in the law, for his counsel given, 3*s.* 8*d.*, with 4*d.* for his dinner."—*L.T., 1939, p. 233.*

An Upward Tendency.—In the reign of Elizabeth it is said that there was a tendency for counsel's fees to be paid on a more generous scale than those paid during the reign of her father, but the rise was

by no means extravagant. A fee of 20s. was more generally paid than theretofore, but even under the Virgin Queen 10s. was not thought too small a sum for an opinion given by the Solicitor-General; and, indeed, this was still a very common fee, a circumstance which led to the saying that "a barrister is like Balaam's ass, only speaking when he sees the angel", the angel being the name popularly given to the coin of 10s., from the fact thtt it showed Michael piercing the dragon. A little later the Chancery practitioners were encouraged by an ordinance passed by the Lords Commissioners regulating the conduct of suits and the payments to Masters, counsel and solicitors, which, *inter alia,* provided that on the hearing of a cause utter barristers should receive £1 fees, whilst the Lord Protector's counsel and Serjeants-at-Law should be paid £2 fees.—*L.T., 1939, p. 233.*

Bacon's Income.—When Bacon was Attorney-General, a post which yielded him the small salary of £81 6s. 8d., he is said to have made no less than £6,000, the greater part consisting of fees paid to him for attending to the King's business. "I shall now", he wrote to the King, "again make oblation to your Majesty—first of my heart, then of my service; thirdly, of my place of Attorney, which I think is honestly worth £6,000 per annum; and, fourthly, of my place in the Star Chamber, which is worth £1,600 per annum, and with the favour and countenance of a Chancellor, much more". Bacon's contemporary, Coke, is said to have made a still larger income during his tenure of the post of Attorney-General, the fees drawn by him during one year reaching no less a figure than £7,000. It will, of course, be remembered that at that time, and, indeed, till comparatively recent days, the law officers were not debarred, as they are now, from acting for private litigants, and the mere fact that they were law officers gave them a status in the opinion of litigants which otherwise they might not have enjoyed. At all events for many centuries the Attorney-General and the Solicitor-General made large incomes when their official salaries and their private practice were conjoined.—*L.T., 1939, p. 233.*

Lord Eldon's Receipts.—"When I was called to the Bar," wrote that eminent lawyer, "Bessie—his wife—and I thought all our troubles were over, business was to pour in, and we were to be rich almost immediately. So I made a bargain with her that during the following year all the money I should receive in the first eleven months should be mine, and whatever I should get in the twelfth month should be hers. That was our agreement, and how do you think it turned out? In the twelfth month I received half-a-guinea—eighteen pence went for charity, and Bessie got nine shillings. In the other eleven months I got not one shilling." This picturesque story would appear to have had little to support its accuracy save the language of the future Chancellor himself, and it was not borne out by a letter written by

his brother William, afterwards Lord Stowell, who told his other brother in the same year that the future Lord Elden after his call to the Bar "seems highly pleased with his circuit success. I hope it is only the beginning of future triumphs. All appearances speak strongly in his favour". In 1786, that is, ten years after his call, his fee book showed the receipt of no less than £6,833 7*s.*, and in the following years this sum was greatly increased, in 1797 reaching £10,557, and even that had been exceeded in one or two of the intervening years.—*L.T., 1939, p. 234.*

Murray and His Retainer.—Lawyers are generally credited, or should we rather say debited, with looking after their fees with a keen scrutiny, but that they are also disinterested has been established time and again. One conspicuous instance is furnished by the career at the Bar of William Murray, whom we best remember by his judicial title of Lord Mansfield. It is said that he numbered among his clients that very notable lady, Sarah, Duchess of Marlborough, who had various suits going on in the Court of Chancery relating to the trusts or her husband's will. Murray was to be briefed, and the Duchess, desirous of stimulating his zeal in her favour, sent him a general retainer with a 1,000 guineas. Immediately he returned 995 guineas with an intimation that the "professional fee, with a general retainer, could neither be less nor more than 5 guineas." It is said that she was a very troublesome client, calling at his chambers at very unseasonable hours, so it would seem he had to work very hard for the fees sent him on her behalf. But this we may say of him, as of his successors in leading practice at the Bar, that they always gave of their best to those for whom they were instructed. Even small fees have evoked sturdy forensic energy. A generation ago a member of the junior Bar was so noted for his opulent style of oratory and for the vigour of his advocacy as to call forth the opinion of one of his contemporaries that he would "tear up the floor for three and one".—*L.T., 1939, p. 234.*

Westminster Hall.—The striking and impressive scene in Westminster Hall last week, when the President of the French Republic and the members of the two Houses of Parliament exchanged the heartiest of greetings within its historic walls, thus demonstrated once again the solidarity of the *entente* between France and England, especially in these days of anxiety in international relationships. The meeting could have had no fitter setting than in the venerable hall which, by its impressive stateliness, symbolises the basis of all well-ordered society—law and order. To lawyers in particular the scene must have revived memories of the days when the hall was the very centre of the legal life of the nation. It was the scene of many historic trials, among others that of Waren Hastings, a circumstance which afforded Macaulay the opportunity of embodying in his famous

essay a purple patch descriptive of the wealth of memories that cluster round its walls. But, apart from these great historic occasions, lawyers like to recall the Hall as the very hub of their professional life. Its interior must have had an inviting appearance in the old days with its crowds walking up and down, eager to witness the trial of cases in the adjoining courts. Especially on the opening of term it must have presented a particularly animated spectacle. We are told that to receive the judges at the opening of term the Serjeants took up their position on the west side of the hall immediately before their court. There, standing in single file, with their faces towards the east wall, they awaited the arrival of the judges, first the Lord Chancellor and then the others in order of seniority. On coming up to the Serjeants the Chancellor shook each of them by the hand, saying, as he did so, "How d'ye do, brother? I wish you a good term." Having thus greeted each wearer of the coif, his lordship, attended by his officers, passed on to the Chancery at the southern end of the hall. In like manner each judge greeted each Serjeant, and then passed each to his own court. It would appear also that at one time a brisk business was carried on in the hall by the sempstresses who manufactured bands and cuffs, lace ruffles and lawn kerchiefs for the grave counsellors and the young gallants of the Inns of Court. The great hall of the present Law Courts, impressive though it is in some respects, is, after all, a poor substitute for the ancient and historic hall at Westminster, which filled so dignified a place in the legal life of London. As one writer some years ago pointed out, when he visited the Law Courts hall, it appeared to be tenanted only by one messenger boy. A change, indeed, from the animation which we associate with Westminster Hall!—*S.J., 1939, p. 245.*

Judicial Committee of the Privy Council: Preparation of Cases.—On Monday, Lord Atkin, when presiding over the First Division of the Judicial Committee of the Privy Council, made reference to the importance of the correct preparation of cases in appeals to the Board. Attention was drawn to Rule 63 of the Judicial Committee Rules, 1923, which provides that the case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. According to the note on the matter in *The Times,* the learned lord said it was very important that appellants should remember what the rule was. Their Lordships attached considerable importance to those cases, and they expected to have them prepared in accordance with the rules so as to give their Lordships the necessary assistance.—*S.J., 1939, p. 245.*

Sauce for the Gander.—An ex-convict, turned Sunday newspaper journalist, recently made a striking contribution to the contro-

versy about the abolition of flogging "in the name of the lash-tortured thousands." He suggested that the six judges who advocate the "mediæval cruelty" of the "cat" should try three strokes each, magnanimously declaring that if they consented he would take seventy-two. The picturesqueness of the ceremony, presumably to take place in the Central Hall of the Royal Courts of Justice, would eclipse the occasion when Henry II did penance under the lash at Canterbury. It might be made an annual affair. Still, despite the satisfying poetic justice of seeing a gunnerhoist with his own petard, one may doubt whether it is practical or necessary to demand that no surgeon should be allowed to perform an operation until he has had a limb or so amputated or that airmen should begin by blowing themselves up with their own bombs.—*S.J., 1939, p. 274.*

Experiment in Punishment.—Still the idea is not altogether new. Mr. Justice Day at Leeds once took a spell on the treadmill and found it so trying that he afterwards said to the warder: "If it is your custom to carry your duty so far as this, I shall have to reduce my sentences." A few years ago a newly appointed Pittsburgh judge sent himself to prison for three days so as to learn the environment and general routine of a gaol. There is a tradition at one of the great Jesuit schools that a former lawyer, on being appointed to the staff after abandoning his profession for the priesthood, insisted on receiving several strokes of the "ferula" (an instrument of punishment applied to the hands of the boys) so as to enable him to estimate its severity. Sir Miles Fleetwood, Recorder of London in the time of James I, once involuntarily went through the experience of awaiting immediate execution, for some highwaymen waylaid him near Tyburn as he was riding down to Buckinghamshire, tied his hands behind him and left him with a halter suspended from the gallows fast round his neck, so that if his horse had moved he would have been hanged, but fortunately the faithful beast stood still.—*S.J., 1939, p. 274.*

BOOK REVIEWS.

THE CODE OF CRIMINAL PROCEDURE, by Mr. S. Ranganadha Aiyar, Advocate, Madras High Court. Sixth Edition. Price Rs. 20, Postage Extra.

We acknowledge with pleasure the receipt of this new edition of "The Code of Criminal Procedure" by Mr. S. Ranganadha Aiyar. The present edition has been revised on the same lines as the previous editions. In some places the book has been re-written in the light of the more recent decisions under the Code. All the amendments up-to-date have been incorporated including those made by the Government of India (Adaptation of Indian Laws) Order, 1937. A bare text of the Code has also been printed in the beginning of the book

for ready reference. The case-law has been brought down to March, 1939. The cross references to the All India Reporter, which is a new feature of this edition, will be found very useful by the practitioner. We have no doubt that this edition will fully maintain the reputation of its predecessors as a recognised text-book on the subject.

FEDERATION *versus* FREEDOM, by B. R. Ambedkar, M.A., P.H.D., D.SC., M.L.A., J.P., Barrister-at-Law, Price Re. 1. Published by Messrs. R. K. Tatris, at Shree Laxmi Narayan Press, 364, Thakurdwar, Bombay 2.

Under the auspices of the Gokhale Institute of Politics and Economics, Dr. Ambedkar delivered an address on 29th January, 1939, the contents of which have been published in the form of a tract. Nothing is more of topical interest than the Government of India Act, 1935, for one who wishes to speak on any constitutional problem connected with India to-day. Apart from the merit of selection of a subject like this, the address, coming as it does from one, who was a delegate to the Round Table Conference, the outcome of whose efforts was the Government of India Act itself, cannot fail to attract sufficient attention from lawyers and politicians.

The structure of the Federal scheme as envisaged in the Government of India Act has received the best scrutiny from the author, and there can be no two opinions as to the thorough familiarity with the subject that the entire address discloses. The defects of the Act pertaining to the All-India Federation are mainly dwelt upon in a short compass. As regards the utter impracticability of a Federal scheme as conceived by the Act, the scathing criticism found in these pages will convince any reader of the futility of such a scheme and the frustration of hopes entertained by politicians and statesmen engaged in the fight for our freedom, not to speak of the bewilderment of students of Constitutional Law at the strange type of a federation without either precedent or prevision. While we appreciate the strong case made out against an All-India Federation necessarily including some of the backward States also, which would mean, according to the author, a permanent devitalising influence upon our freedom, there has been no real solution mentioned, except the statement that "the wisest course seems to me that leaving the states where they are, British India should proceed on its own evolution and Federation for itself" (p. 144). How far such a view will commend itself to the maturer statesmen of this country, we feel grave doubts about. But at the same time, one feels some justification in the point of view urged by the author for the retention of such of the states in whose case, by measure of area and revenue the position to provide a decent state of administration is ensured, and for the abolition of the rest that have very negligible resources at their command. Indeed, he supports the proposal for

the creation of new Provinces with the dismembered units and remnants of such states, which prove an obstacle in the way of a real Indian Federation. The many other handicaps for an efficient working of the Federation are enumerated in every one of the ten chapters composing the address.

The address, on the whole, contains vigorous thinking and plain speaking. But strangely enough the author is betrayed into bitternesses born of his own personal differences in politics. His references to the Congress and its accredited leader Mahatma Gandhi are not free from prejudices. For instance, the sentence "No man has brought greater disasters to the interests of India than did Mr. Gandhi at the Round Table Conference" (p. 151), and the statement that "it is surprising that congressmen should have become so enamoured of the prospect of seizing political power that their demands against the British Government did not even contain a declaration from the British Government in this behalf" (p. 113), are not only not convincing but may even detract us from a correct estimate of an otherwise able criticism of the Government of India Act.

We cannot close this small volume without a feeling of thankfulness to the author for his clear enunciation of the outlines of the Federal Scheme in the Act and his relevant comments on the baffling anomalies contained in some of the sections.

THE LAW OF PUBLIC HEALTH IN MADRAS PROVINCE, by Mr. C. V. Naidu, Advocate, Madras High Court (1st Edition). Published by Rajeswari & Co., Tiruvallur (M. & S.M.Ry.). Price Rs. 5 net.

The Madras Public Health Act which has recently been passed by the Madras Legislature is a comprehensive enactment of a beneficial nature dealing with all aspects of public health. The subject of the enactment has been under the consideration of the Government and its advisers for several years and its provisions have been scrutinized and revised by the Director of Public Health. Though it was originally proposed only to make suitable additions and amendments in this behalf in the Madras City Municipal Act, the Madras District Municipalities Act and the Madras Local Boards Act, that idea was subsequently dropped and a comprehensive enactment dealing with all aspects of public health has been undertaken and passed. Mr. C. V. Naidu who is already familiar to us as the author of the Law of Madras Local Boards and the commentaries on the Indian Elections Offences and Inquiries Act has brought out a commentary on this Act which is not only explanatory of its provisions but also analytical and critical in its nature. He has also dealt with the Madras Prevention of Adulteration Act and the Public Places Resort Act and also given the rules made thereunder. We

have no doubt that the commentary will be found useful for all those who have to deal with the subject.

THE MADRAS PUBLIC HEALTH ACT (Act III of 1939), by Mr. C. R. Krishna Rao, B.A., B.L., Advocate, Madras and Reporter, "All India Reporter". Published by V. S. N. Chari & Co., Madras. Price Rs. 2.

This attractive little book gives the provisions of the Madras Public Health Act with notes under the sections and the corresponding references to the other enactments on which the sections are based. The notes under the sections which are brief, explain the principle underlying the sections and give other useful information leading to a correct understanding of the sections. Important English and Indian decisions bearing on the analogous provisions of other similar enactments are also given and their applicability to the provisions of the Act has been considered. As the enactment is a recent one, there can be no case-law under it to elucidate its provisions. The learned author has therefore reproduced the statements of objects of the bill and the Select Committee's Report which will throw considerable light on the provisions of the Act though they may not be useful in a Court of Law for construing the enactment. We believe that the book will be found useful for all those having to deal with the subject.

THE CHILD MARRIAGE RESTRAINT ACT, by Messrs. Tek Chand, M.A., B.C.L. (Oxon), Barrister-at-Law, Advocate, High, Court, Lahore and H. L. Sarin, Advocate, High Court, Lahore. Published by The Eastern Law House, Calcutta. Price Rs. 2-8.

This piece of legislation evoked a great deal of controversy at the time of its first enactment in 1929 but the provisions of the Act have come to stay and they have still further been tightened by providing for remedies in Civil Courts against the infringement of its provisions and by penalising marriages celebrated outside the territorial limits of British India by the provisions of the amending Acts of 1938. The book under review has incorporated the amendments and noticed all the cases bearing upon the enactment up-to-date. He has also made suggestions for further legislation towards the end of the introduction to this book, the first of which is to declare marriages in contravention of the Act invalid. This aspect of the matter was considered fully in 1929 and it was realised that the consequence of rendering such marriages are invalid would be disastrous both from the legal and social point of view. We are not sure that in repeating that suggestion the learned authors' enthusiasm has not overrun their discretion.

THE INDIAN INCOME-TAX ACT (AS AMENDED BY ACT VII OF 1939), by M. B. R. Jain (II Edition), 1939. Published by The Income-tax Law Publishing House, Delhi. Price Rs. 10.

The Income-tax Law in this country has been recast by the recent amending Act which has introduced sweeping changes in very material respects that the learned author has found it necessary to bring out a second edition of his book within two years of the first. The recent amendments embody many of the suggestions made by the Expert Committee appointed by the Government of India to enquire into and report on the working of the Income-tax Law. The learned author has noticed the changes effected in the Act and their effect. He has deleted references to the decisions which have become obsolete by reason of the amendments but has retained those which have still validity. He has also given extracts from the Enquiry Committee's report and the proceedings of the legislature which will be found useful. We have every hope that this commentary on the Indian Income-tax Act as amended up-to-date will be found useful by all those having to do with the Income-tax Law and practice.

THE PROVINCIAL INSOLVENCY ACT, by Rameshwardial, B.A. (HONS.), LL.B., P.C.S., with a Foreword by The Hon'ble Mr. Justice J. H. Monroe, High Court, Lahore. Published by University Book Agency, Law Publishers, Kutchery Road, Lahore. First Edition. Price Rs. 9.

This is the latest commentary on the Provincial Insolvency Act, an enactment in which there is an ever increasing mass of the case-law. The growth of case-law under the Act may be judged from the number of cases included in the addenda of the work which give the cases that appeared since the book went to print. An up-to-date commentary on such an enactment is therefore particularly useful. The notes under the sections are full and no case of any importance has been omitted. The rules made by the various High Courts under the Act are given towards the end of the book. There is also a comparative table at the opening of the book which indicates the corresponding sections of the previous Provincial Insolvency Act, the Presidency Towns Insolvency Act and the English Bankruptcy Acts. The Index at the end is exhaustive. From what has been said by us, it will be agreed that the book will be found useful to all those having to deal with the subject.

THE LAW OF CIVIL APPEAL AND REVISION, by K. N. Bhaumik, B.L. Published by Messrs. Eastern Law House Calcutta, 1939. Price Rs. 5.

In this book the learned author has dealt with all the points of law and practice which are likely to arise on the subjects of Civil Appeals and Revisions. They are all scattered in a number of enactments and decisions. The relevant provisions of the Civil Procedure Code are given in the opening with the local amendments if any. Then the subject is dealt with in the various chapters in their natural

order and not by way of commentaries to the enactments. Each chapter deals with a distinct subject in all its aspects. The relevant decisions are all noticed and considered fully in their proper places with appropriate marginal references. At the end are given the Appellate Side Rules of the several High Courts and the Letters Patent, the Rules of the Federal Court and the forms. The book will be found useful in solving many of the difficult questions which are likely to arise in civil appeals and revisions. We hope that the learning contained in the book will be largely availed of by the bench and the bar.

[END OF VOLUME]

THE
MADRAS LAW JOURNAL.

I] JANUARY [1939

RETIREMENT OF JUSTICE SIR C. MADHAVAN NAIR.

Sir C. Madhavan Nair has retired after a distinguished career in various exalted offices in the Bar and on the Bench. He joined the Madras Bar at a time when the great giants like the late Sir V. Bashyam Aiyangar, Sir C. Sankaran Nair, V. Krishnaswami Aiyar and P. R. Sundaram Aiyar were in active life and had their stimulating examples before him for learning and industry. From the very beginning he conceived a high sense of duty and this served him well in every walk of life. Our esteemed Advocate-General has, in his felicitous farewell speech the other day, borne ample testimony to his splendid work as a Professor of Law in the Madras Law College. Amidst the arduous professional work at the Bar he found time to discharge the duties as an Assistant Editor of the Madras Series of Indian Law Reports. His elevation successively to the posts of Government Pleader and Advocate-General was looked upon with satisfaction by the Bar to which he was always well disposed. Since 1924 he has been a Judge of the Madras High Court and has acted twice as Chief Justice.

As a Judge, his judgments were always marked by lucidity of expression and cogency of reasoning. He dealt fully with all the points advanced by the Bar before him whether of fact or law. We are sure that his decisions will be continued to be read with interest and profit not only for their learning but also for the dignity of their diction. He was uniformly courteous to the Bar and no member of the Bar entered his Court or came out of it without a feeling of pleasure and satisfaction.

This Journal has associations with his family from its inception, as his uncle the late Sir C. Sankaran Nair was one of its founders, and we have every reason to believe that he was always kindly disposed towards us. We wish him a long and happy life in his retirement amidst his literary and other useful avocations.

THE
MADRAS LAW JOURNAL.

I] JANUARY [1939

NOTES OF RECENT CASES.

Lakshmana Rao, J. Crl. R. C. No. 587 of 1938.
21st November, 1938.

Explosives Act (IV of 1884), S. 4—Construction—'Explosive'—If includes electric-sparklets.

The definition of 'explosive' in S. 4 of the Explosives Act is wide enough to include electric sparklets and the exemption of 'toy fire works' was removed by the amendment of the rules in 1917.

B. Jagannadha Das for Petitioner.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

G. S. V.

Venkataramana Rao, J. S. A. No. 990 of 1934.
28th November, 1938.

Evidence Act (I of 1872),—Suit by presumptive reversioner to declare a sale by widow as not binding on reversion—Statement by plaintiff reversioner in a prior suit as legatee—If admissible in this later suit as reversioner—Statement in prior suit by widow's mother-in-law—Admissible under S. 32 cl. (5) of the Evidence Act.

One *K* died leaving a widow *V* (1st defendant). *K* was the adopted son of one *S*. In a suit brought by *V* against *S*, the said *S* made a statement to the effect that *K* was understood to have taken a boy *N*, "son of *L*, who is a gnati and a cousin brother" of K in adoption. Pending the suit *S* died and the present plaintiff *Vi* was brought on record as legal representative as he was a legatee under a will of *S*. In that suit he adopted the contentions of *S*. Later *Vi* brought this present suit as reversioner against *V* for a declaration that a sale deed executed on her behalf by her father was not binding on him. *Vi* was an heir only as a bandhu. On the question whether there were nearer reversioners or not, the question was raised as to whether the statement of *Vi* in the prior suit adopting the statement of *S* that there was a gnati *L* was admissible in this suit.

Held, that the statement by *Vi* was then made as a legatee and that statement will not be admissible in this suit as a presumptive

reversioner but the statement of *S* will be admissible under S. 32 cl. (5) of the Evidence Act.

V. Govindarajachari and *B. Lakshminarayana* for Appellant.

S. V. Venugopalachari for *P. C. Parthasarathi Aiyangar* for Respondent.

G. S. V.

———

Varadachariar and
Abdur Rahman, JJ.
29th November, 1938.

Appeal No. 25 of 1935.

Mesne profits—Hindu law—Widow—Alienation by—Death of widow —Suit for possession by reversioner questioning the alienation—Alienation found invalid—Conditional decree for possession on payment of binding portion of debt—If plaintiff entitled to mesne profits from widow's death or only from date of payment.

A reversioner sued for recovery of possession of properties of one *L*, who died in 1889 leaving behind a widow *S* who died in February 1926. The 1st defendant is the widow of a brother of *S*. She got the properties from her husband, who in turn had taken possession in execution of a foreclosure decree obtained by him against her sister (that is *S*) in O. S. No. 51 of 1903. The case of the reversioner was that the document (Ex. V) on foot of which O. S. No.51 of 1903 was filed was not binding on the reversioner and therefore the decree also. It was found that the decree in O. S. No. 51 of 1903 was not binding upon the plaintiff and that there was a debt binding on the estate for Rs. 900 on the date of Ex. V on which the estate was liable to pay a reasonable rate of interest (12 per cent). *S's* brother took possession in pursuance of the decree in 1905. The question was raised how far the defendant was entitled to interest on the binding portion of the debt; and as for mesne profits, if the plaintiff was entitled to mesne profits till the payment was made, as the decree is for possession only after payment.

Held, that after 1905, there is no justification for calculating any interest as against the estate up to the date of the widow's death. So that on the date of the widow's death the reversioner would have been entitled to demand possession subject to payment of the binding debt and interest up to 1905 thereon. As for mesne profits, in the case of a reversioner suing for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the widow's death and entitled to mesne profits from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to suit.

I.L.R. 35 Cal. 420, followed.

I.L.R. 41 All. 63, distinguished as an alienation by a Hindu father.

K. Kameswara Rao and *D. Narasa Raju* for Appellants.

B. Somayya for Respondent.

S. V. V.

———

Varadachariar and
Abdur Rahman, JJ.
8th December, 1938.

C. M. S. A. No. 56 of 1935.

Insurance policy—Assignment of—Endorsement, if an absolute present transfer—Validity of transfer—Decree against assets of assured—If policy amount assets of deceased—Bonus reserved to be paid to assured—Assets—Transfer of Property Act, S. 130—Absolute transfer—What is.

K is the widow of *K. R.* The said *K. R.* obtained an endowment policy in 1927 payable on 5th April, 1932 or on the death of the assured earlier. On 3rd July 1933 the assured assigned the policy by an endorsement on the policy itself. This assignment was duly communicated to the insurance company and there registered, though the company guarded itself by not admitting the validity of the assignment. The assured died in 1933. A decree was passed against *K* as the legal representative of *K.R.* against the assets of *K. R.* in the hands of *K.*

The decree-holder claimed to attach this policy as the assets of the assured. The endorsement on the policy was as usual and as follows :—"In consideration of natural love and affection, I do hereby assign the benefit of all moneys to become payable under the policy . . . . (reserving to myself the right to receive in cash or apply in reduction of premia any bonus that may be declared upon such policy from time to time) to my wife and declare that her receipt shall be a sufficient discharge to the company for the same, provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment had not been made".

Held, as the endorsement stated that the assured "doth hereby assign the benefit of all moneys, etc. to the wife, it was a complete endorsement passing a present interest in it to the assignee during his lifetime and not a mere power-of-attorney or a transfer *in futuro.*

(1917) 1 Ch. 1 and I.L.R. 2 Rang. 388 discussed and distinguished

The endorsement is a present transfer in favour of the assignee, though provision is also made for a reverter to the assignor in certain contingencies. The provision for reverter only emphasises the immediate operativeness of the transfer.

The transfer is also absolute and valid under S. 130 Transfer of Property Act. There is no possibility here of the transferor and transferee having fractional rights in the policy amount at one and the same time. So long as the transferee's interest exists, she has the whole interest and when the defeasance clause comes into operation, the interest of the person who takes under the defeasance clause is equally an absolute interest. *Bonus* is expressly reserved to the assignor so that any bonus not applied by the deceased for premia during his lifetime will be assets of the deceased. The policy amount is not *assets* of *K. R.* as it had become the property of *K* before *K. R.*'s death.

O. T. G. Nambiar and *N. T. K. Nambiar* for Appellant.

P. Govinda Menon for Respondent.

S. V. V.

Varadachariar and Abdur Rahman, JJ. 9th December, 1938. Appeal No. 82 of 1935.

Hindu Law—Trade started by father in a non-trading family—Debts incurred for such trade—If not binding on the sons.

A debt by a Hindu father in connection with a trade started by himself, when trade was not the normal occupation of the family, cannot be held to be avyavaharika debt so as not to bind the sons.

I.L.R. 49 Mad. 211 is not in this respect to be deemed to be overruled by I.L.R. 54 All. 564.

P. Satyanarayana Rao for Appellant.

K. Kotayya for Respondents.

S. V. V.

Varadachariar and Abdur Rahman, JJ. 13th December, 1938. A.S. No. 151 and 249 of 1936.

Hindu Law—Maintenance—Husband dying leaving a will—Will providing for a particular rate of maintenance—Court, if can interfere with such provision as inadequate—Widow living apart for no justifiable cause—No improper reason for her living apart—If she forfeits her right to future maintenance—Maintenance, if can be enforced against a legatee from her husband.

Where a person dies leaving behind a widow and a daughter and a will under which he has made some provision for the maintenance of the wife and the daughter, the Court's power to fix a reasonable maintenance is not taken away. The provision in the will can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance. Where therefore the Court finds that a provision in the will is inadequate, it is within the power of the Court to substitute a more reasonable provision.

Opinion of Cox, J., in 12 C.W.N. 808, approved.

The question whether a wife who, during her husband's lifetime, had lived apart from him without justifiable cause but for no improper purpose, forfeits her right to future maintenance for all time or is merely prevented from claiming separate maintenance during the time that she is living apart and if that claim can be enforced against a legatee from the husband left open.

I.L.R. 31 Mad. 338, approved.

55 M.L.J. 242 distinguished as a case of arrears of maintenance.

A.I.R. 1938 Mad. 914 distinguished as a claim by a daughter-in-law against a legatee of her father-in-law's self-acquired properties under a bequest.

G. Lakshmanna and *P. S. Ramachandra Aiyar* for Appellants in A. S. No. 249 of 1936 and Respondents in A. S. No. 151 of 1936.

P. V. Rajamannar and *K. Subba Rao* for Respondents in A. S. No. 249 of 1936 and Appellants in A. S. No. 151 of 1936.

S. V. V.

Lakshmana Rao, J. C. M. P. No. 3412 of 1938.
1st December, 1938.

Madras District Municipalities Act (V of 1920), Ss. 12, 49 and 51—Disqualification of a person under S. 49 (2) (c)—Election as Councillor and Chairman—Petition to set aside election as Chairman—Declaration of the other candidate as Chairman—Validity of—Proper procedure.

A who was disqualified for election as a Councillor under S. 49 (2) (*c*) of the District Municipalities Act, was returned as such and was later elected as Chairman of the Council by a majority. *B* who contested in the election of Chairman filed a petition before the Election Commissioner for a declaration that the election of *A* as Chairman was void and that he was duly elected as Chairman. The election of *A* as Chairman was set aside and *B* was declared duly elected.

Held, that a separate petition to set aside the election of *A* as Chairman was unnecessary as under S. 12 (4) the Chairman is deemed to vacate office on his ceasing to be a Councillor. The petition to the Election Commissioner can be treated as a petition to set aside the election of *A* as a Councillor but a declaration that *B* was the duly elected Chairman cannot be granted in such a petition.

K. S. Jayarama Aiyar, G. Gopalaswami and *Yusuf Sait* for Petitioner.

T. M. Krishnaswami Aiyar and *B. Pocker* for Respondent.

G. S. V.

Varadachariar and Abdur Rahman, JJ. Appeal No. 111 of 1934.
15th December, 1938.

Hindu Law—Adoption—Consent of sapinda—Consent obtained on condition that his share in the joint family should not be affected by the adoption—If valid—Consenting sapinda, if can question validity of his consent.

When a sapinda in giving his consent to an adoption by the widow protects himself from loss by stipulating that the adopted son should not claim a share in the joint family property in the enjoyment of such sapinda, whether the consent of the sapinda so given is to be treated as given from corrupt or improper motives or not, it is not open to the consenting sapinda himself to plead invalidity of the adoption on that ground. The adopted son having changed his status on the faith of the authority conferred on the widow to take him in adoption as the result of the sapinda's consent, it is not open to that very sapinda to call in question the validity of the consent. The case is analogous to one in which a widow representing herself to have been authorised by her husband to make an adoption takes a boy in adoption; and in this class of cases it is settled that the widow will be precluded from question-

ing the validity of the adoption made by herself on the representation that she had her husband's authority.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

S. V. V. ——

Madhavan Nair and Stodart, JJ. C. M. P. No. 5016 of 1938 and C. R. P. No. 26 of 1939

12th January, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Application under—Proper Court to entertain.

The explanation of the expression "Court which passed the decree" in S. 20 equally applies to S. 19. The Court contemplated in S. 19 is the Court which passed the decree that is the Court of first instance. So an application under S. 19 should be made to the Court of first instance.

P. V. Vallabhacharyulu for Petitioner.

A. Satyanarayana for Respondent.

G. S. V. ——

Wadsworth, J. S. A. No. 169 of 1935.

12th January, 1939.

Insolvency—Suit on a mortgage by the mortgagee—Final decree for sale—Subsequent adjudication of mortgagor as an insolvent—Official Receiver not made party in execution—Execution sale and purchase by a stranger in good faith—Subsequent sale of the same property by the Official Receiver—Purchaser from the Official Receiver gets title to the equity of redemption—Civil Procedure Code (V of 1908), O. 21, r. 22—Provincial Insolvency Act (V of 1920), S. 51

Where subsequent to the final decree and order for sale in a mortgage suit, the mortgagor is adjudicated as an insolvent, but in ignorance of the insolvency, the Official Receiver is not brought on the record in execution and the property is sold in execution and bought by a *bona fide* purchaser, he does not get a good title to the equity of redemption as against the Official Receiver or a purchaser from him subsequent to the execution sale.

I.L.R. 42 Cal. 72 and I.L.R. 59 Mad. 461, followed.

For this purpose, it does not make any difference that the decree is a mortgage decree and not a money decree as in the above cases.

32 I.C. 489, followed.

The fact that the execution purchaser bought the property in good faith and without knowledge of the insolvency will not protect his purchase under S. 51 (3) of the Provincial Insolvency Act, as this provision has reference to a stage prior to the adjudication.

(1938) 1 M.L.J. 471, followed.

C. A. Seshagiri Sastri for Appellant.

T. M. Krishnaswamy Aiyar and *A. Balasubramanya Aiyar* for Respondent.

K. C. ——

Wadsworth, J. S. A. No. 235 of 1935.
16th January, 1939.

Evidence Act (I of 1872), S. 157—Deed not inter partes*—Recital of boundary in—Executant of document examined as a witness—Admissibility of the recital.*

A recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title against a person who is not a party to the document. But when the executant of a document not *inter partes* containing a recital of boundary is a witness in a case, the recital of boundary can be let in evidence under S. 157 of the Evidence Act, as a former statement corroborating the deposition. The statement that a certain person was in possession of the land on a certain boundary is a contemporaneous statement regarding the occupation of the land in the boundary.

44 C.L.J. 582, relied on.

R. Rangachariar for Appellant.

S. Ramanujachariar for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. No. 1436 of 1936.
19th January, 1939.

Evidence Act (I of 1872), Ss. 24, 25 and 26—Applicability—Inquiry on complaint—Admission of liability before police officer—Admissibility.

Where a complaint was made before an Inspector of Police and in an enquiry made thereon, the defendant was alleged to have made an admission of liability to the Police Officer who recorded it, the recorded admission is admissible in evidence in a civil suit and Ss. 24, 25 and 26 of the Evidence Act are not applicable.

V. G. Row for Petitioner.

Respondent not represented.

G. S. V.

Varadachariar and Gentle, JJ. Appeal No. 128 of 1935.
23rd January, 1939.

Transfer of Property Act (IV of 1882), S 53—Mortgage in fraud of creditors—Contemporaneous advance—If mortgage good to that extent.

If a transaction offends S 53 of the Transfer of Property Act, it cannot be ordinarily upheld even to the extent to which it may be found to be supported by consideration, because, whatever may be the importance of the question of consideration, when dealing with the question of fact, namely, whether the transaction

N.R.C.

was one that offended S. 53 or not, it has little bearing once the conclusion is reached that the transaction does offend S. 53. An exception has however been made in the transferee's favour in cases in which any part of the consideration for the document has been applied in the discharge of pre-existing secured debts, and it has been held that the transferee might in such cases be entitled to the benefit of the doctrine of subrogation. A distinction is also suggested between sales and mortgages and it has been held that whereas a sale might have to be wholly set aside if it offends S. 53, a mortgage might be upheld as a valid security to the extent of the debt actually due on the date of the mortgage. But no case has gone the length of holding that even when there was no pre-existing debt, the mere fact that some consideration passed under a mortgage which is found to be in fraud of creditors would justify the view that the mortgage can be held to be a valid security to the extent of the contemporaneous advance.

46 M.L.J. 125, doubted and distinguished.

Ch. Raghava Rao for Appellant.

K. V. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Respondents.

S. V. V.

Varadachariar and Gentle, JJ. Appeal No. 159 of 1935.
24th January, 1939.

Limitation Act (IX of 1908)—Partnership—Acknowledgment made by one partner—If sufficient acknowledgment.

An acknowledgment made by one partner on whom a demand was made, and who held the largest interest in the business and was also conducting the business is sufficient acknowledgment binding on the other partners also.

I.L.R. 41 Mad. 427, followed.

S. Venkatesa Aiyangar for Appellants.

T. V. Ramiah and *King and Partridge* for Respondents.

S. V. V.

Pandrang Row, J. C. M. P. Nos. 4775 and 5376 of 1938.
24th January, 1939.

Madras Local Boards Act (XIV of 1920), S. 55 (2) (c)—Completion of work undertaken—Money claim against a person under a security agreement—If amounts to subsisting contract.

A person contracted to perform a major work for a District Board and executed a bond to the President for a certain sum as security for the due performance by him of the contract. The work was completely performed to the satisfaction of the Board before the date of his nomination and no claim could be made on

the ground that the contract had not been duly performed. The only subsisting contract is a contract whereby the Board is permitted to recover under the security agreement from the deposit made by him such amount as is covered by any objection that may be made by the Audit Department.

Held, that the person is not disqualified for election, as the money claim that may possibly be made is not a contract of the kind contemplated in S. 55 (2) (*c*) of the Madras Local Boards Act. A contract which had ceased to be enforceable and under which no claim can be made by either party cannot be regarded as a 'subsisting contract'.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioners.

K. Rajah Aiyar for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 161 of 1936.
25th January, 1939.

Madras Local Boards Act (XIV of 1920), S. 79, cl. 3—Zamindari villages—Quarries, fisheries and pasture—Levy of local cess in respect of income—Principle of double assessment.

Lands containing quarries and pasturage situated within and occupied by the Zamindar in certain villages were assessed to local cess by the Local Board under S. 79 (3) of the Madras Local Boards Act. It was contended for the Zamindar that lease of quarry meant sale of corpus and did not amount to income, and that non-agricultural income was not liable to local cess under the Act in as much as income-tax was in any event levied.

Held, that such income became liable to assessment to cess in accordance with the strict construction of S. 79 (3) of the Madras Local Boards Act and that the levy should be upheld in spite of the hardship caused by double taxation.

I.L.R. 34 Cal. 257 and I.L.R. 50 All. 98, referred to.

Held, further, that the income realised from fisheries in the estate though previously assessed to income-tax also became liable for the levy of cess as fisheries constitute 'land' for purposes of the Act.

63 M.L.J. 634 (F.B.), explained.

Leave granted.

The Government Pleader (B. Sitarama Rao) for Appellant.

K. Someswara Rao and *Y. Govindarajulu* for Respondent.

B. V. V.

Varadachariar and Gentle, JJ. Appeal No. 178 of 1935.
25th January, 1939.

Specific performance—Contract to sell—Failure of vendee to ay—A term lease by vendor to raise money for filing suit for specific performance—If itself a bar to suit—Readiness of vendor to perform—Meaning of—Alternative claim for damages—If sustainable.

A agreed to sell a piece of land to *B* for Rs. 9,000. He received Rs 100 by way of advance and it was agreed that the balance should be paid within one month and the transaction completed. As the sale deed was largely for discharge of debts of *A*, it was agreed that the balance after payment of debts should be paid before the Sub-Registrar at the time of registration. As a lease was outstanding, the contract provided that possession should be delivered to the vendee after the expiration of the lease-period. As for nearly a year, the sale deed was not executed, *A* arranged to file a suit for specific performance and for that purpose raised Rs. 1,000 by a munigutta lease under which the transferee was to be in possession for 12 years to get the advance of Rs. 1,000 liquidated. As *B* pleaded that by virtue of this munigutta lease, *A* disabled himself from carrying out the contract, the suit must fail. *A* got a release from lessee that he had given up his rights under it but as tenants had raised crops on it, they should be allowed to harvest that season. *A* also claimed damages and *B* pleaded that if *A* had disentitled himself to claim specific performance by his own conduct, the claim for damages also cannot be sustained under S. 19 of Specific Relief Act and I.L.R. 52 Bom. 597.

Held, that so far as claim to damages that there is a distinction between a claim to damages on the footing that the contract had been broken by the defendant and the breach had been accepted by the plaintiff and a claim to damages as merely an alternative to a claim for specific performance as in this case. In such a case as held in I.L.R. 52 Bom. 597 the claim to damages is not sustainable as an independent claim. As for the other ground of unreadiness and incapacity to perform his part of the contract,

Held, that the execution of munigutta lease cannot of itself be held to show that *A* was not ready and willing. If *A* entered into the transaction of munigutta lease showing an intention to abandon the contract or treat it as at an end, it may be he is not entitled to specific performance. But otherwise the question will be one of fact whether by such transaction he has incapacitated or disabled himself and therefore evidence must be taken to decide the question.

V. Subramaniam for Appellant.
V. Govindarajachari for Respondent.
S. V. V.

Madhavan Nair, J. S. A. No. 383 of 1935.
18th January, 1939.

Transfer of Property Act (IV of 1882), S. 58 (d)—Usufructuary mortgage—Period of redemption fixed—Mortgagor's undertaking to pay the amount—If a personal covenant.

Where a mortgage deed recites that the mortgagee shall hold and enjoy the property as *otti* for 3 years and fixes the period to redeem the lands after payment of the amount due on the mortgage and the amount of expenses incurred by mortgagee for levelling in respect of the land and further the mortgagor undertakes to pay the amounts,

Held, that the document embodies a personal covenant to pay the money.

I.L.R. 56 Mad. 892, referred to.

R. Sethurama Sastri for Appellant.

T. L. Venkatarama Aiyar for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. Nos. 28 and 86
18th January, 1939. of 1937.

Civil Procedure Code (V of 1908), O. 47, r. 1—Error apparent on face of record—Case wrongly dismissed for default—Application for review—Maintainability.

A plaintiff appeared but failed to produce his evidence and asked for adjournment. The Court purported to dismiss the suit under O. 9, r. 8, Civil Procedure Code, for default. An application for review was made.

Held, that the Court should have proceeded to decide the suit under O. 17, r. 3 and this is an error apparent on the face of the order, and is a sufficient ground on which review can be granted.

T. K. Srinivasa Thathachariar for Petitioners.

T. Kumaraswami Aiyah for Respondents.

G. S. V.

Varadachariar and Gentle, JJ. A. S. No. 109 of 1935.
19th January, 1939.

Association—Meeting—Notice given of a resolution—Amendment moved at the meeting—Want of notice in respect of—Amended resolution passed at the meeting—Interference by Court.

Notice was given of a resolution to be moved at the general body meeting of an Association registered under Act XXI of 1860 in compliance with the requirements of law and rules framed by it. An addition to the resolution was brought up before the

meeting and was moved by way of an amendment and the Chairman held it was only explanatory of the new proposition and not an additional matter and the resolution as amended was passed.

Held, when a question of sufficiency of notice is raised, the point for consideration is not how the matter was understood by those present but how it might have been understood by such of the members as did not happen to attend the meeting.

(1868) 5 Eq. 450 at 481, referred to.

The rule as to notice is intended to ensure the ascertainment of the views of the majority and if the notice is defective it cannot be assumed that those who attended the meeting formed an absolute majority of the members or that any resolution passed at the meeting necessarily represented the wishes of such majority. The Court will interfere with such irregularity and declare that so much of the resolution as was newly introduced was not duly passed and the minority should have an opportunity of having the subject duly considered at a meeting of the members after proper notice.

K. Rajah Aiyar and *S. V. B. Rao* for Appellants.

B. Sitarama Rao and *P. Panini Rao* for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. C. C. C. A. No. 74 of 1935.
25th January, 1939.

Limitation Act (IX of 1908), Arts. 62, 120, 123 and 144—Suit by heir on death of prior legatee for partition—Property in the hands of tenant for true owner—Limitation for rent.

C was entitled to a share in the suit properties on the death of *N*. After *C's* death, the plaintiff brought a suit claiming the share to which *C* was entitled and rent. One of the tenants, who was a defendant, was in actual possession on behalf of the true owner after the death of *N*.

Held, that as regards relief for partition Art. 144 applies and not Art. 123 and the period runs from the date of death of *C*. As regards relief for rent, Art. 120 applies and not Art. 62.

I.L.R. 14 Cal. 801, distinguished.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

P. V. Rajamannar, K. Subba Rao, A. V. Avudainayagam and *V. P. Chakravarthi* for Respondents.

G. S. V.

Pandrang Row, J. C. M. P. No. 1979 of 1938.
25th January, 1939.

Madras Hindu Religious Endowments Act (II of 1927), S. 65-A (5) (b)—Appeal under, fully heard—Adjournment for passing final orders to a certain date—President alone adjourning the case to a prior date "for orders"—Appellant not given notice of this date—Judgment delivered by Full Board—Members of the Board not sitting together when passing orders—Validity of judgment.

An appeal to the Board under Chapter VI-A of the Madras Hindu Religious Endowments Act was fully heard by the Full Board and was adjourned to 21st April for final orders. On 4th April it was posted to 12th April "for orders" by the President of the Board and on the 12th April the orders were passed by the Full Board dismissing the appeal. The appellant had no notice of the date on which the judgment was to be pronounced.

Held, that the procedure followed by the Board cannot be said to offend against any fundamental rule of natural justice or equity. The Board is not bound to follow the rules of the Civil Procedure Code or the rules contained in the Rules of Practice. The mere fact that the final order was passed by the Board without giving notice of the date on which the order was to be pronounced and the members of the Board did not actually sit together when signing the judgment or order does not render the judgment invalid or contrary to law.

T. M. Krishnaswami Aiyar and *S. Ramanujam* for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar), V. V. Chowdary and *M. Seshachalapathi* for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. C. C. C. A. No. 38 of 1937.
26th January, 1939.

Presidency Small Cause Courts Act (XV of 1882), S. 28—Superstructure which can be removed by tenant—If movable property—Suit to set aside claim order in proceeding arising in execution of a Small Cause Court decree—Cognisability by City Civil Court—Madras City Civil Courts Act, S. 5—Scope.

A decree-holder in a small cause suit sought to attach the superstructure which the defendant, a tenant, would be entitled to remove without the permission of the landlord before the termination of the tenancy. A third party preferred a claim to it which was allowed. A suit was filed in the City Civil Court to set aside the order on the claim petition.

Held, that the superstructure must be deemed to be movable property falling within S. 28 of the Presidency Small Cause Courts Act. The City Civil Court has no jurisdiction to try the suit, as the question arose in execution of the Small Cause Court decree. There is no distinction between questions arising 'in' execution and questions arising 'out of' execution of a Small Cause Court decree.

S. 5 of the Madras City Civil Courts Act does not enable the City Civil Court to entertain suits which are cognisable by the Small Cause Court.

I.L.R. 39 Mad. 219 (F.B.), referred to

25 L.W. 115, relied on.

V. Krishnamachariar for Appellant.

Rangaswami Aiyangar and *Ramaratnam* for 1st Respondent.

G. S. V.

Wadsworth, J. S. A. No. 197 of 1934.

30th January, 1939.

Malabar Law—Acquisition of properties in names of sisters out of brother's funds—If joint tenancy or tenancy-in-common created—Inference of benami as regards beneficial interest in property and share in it.

Properties were acquired in the joint names of three sisters in a Malabar Marumakkathayam family with the funds which were supplied by their brother. The lower Court held that the three sisters held the properties as to three-fourths of their value beneficially and as to one-fourth of their value as benamidars for their brother and the three sisters took as joint tenants with right of survivorship in favour of themselves and their brother or as members of a *tavashi* with the incidence of impartibility.

Held, that a joint tenancy with right of survivorship is not created. It cannot be inferred that there is no tenancy in common from the fact that the three sisters were made joint holders of the property in the document of title. A document may convey a beneficial title as to one item, while being a benami transfer as to another item included in the genuine deed in order to defeat creditors. But persons in whose favour a single property has been transferred cannot take a beneficial interest in that property, while at the same time constituting themselves benamidars in an undivided and unspecified share in favour of the person who provides the funds.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondents.

G. S. V.

Burn, J. C. R. P. No. 180 of 1938.
6th January, 1939.

Companies Act (VII of 1913), Ss. 28 (2) and 30 (1)—Person subscribing for shares in the memorandum of association—No allotment of shares—Liability for value of shares.

Where a person subscribed for 20 shares in the memorandum of association and the prospectus contained a statement that a certain number of shares were subscribed by the signatories to the memorandum and allotted and there was no resolution in the minutes book of directors allotting shares to the persons concerned,

Held, that as there was no valid allotment of shares no liability to pay the value of the shares arose.

V. T. Rangaswami Aiyangar and *K. Venkateswaran* for Petitioner.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

G. S. V.

Venkataramana Rao, J. C. C. C. A. No. 43 of 1936.
11th January, 1939.

Madras Marumakkatayam Act (XXII of 1933), S. 5 (2)—Marriage between a Brahmin and a Nair lady—Validity of—Benefit under the Act—If can be renounced by declaration.

A Brahmin by birth, following the Hindu religion and having already a wife, married a Nair lady belonging to a tarwad of Malabar and it was alleged that the latter by a declaration renounced the Marumakkatayam Law and the benefit conferred by the Madras Marumakkatayam Act by going through the form of marriage and that the marriage must be deemed to be valid.

Held, that it was not open to a private individual to get rid of the statutory prohibition which is enacted in the Act by a mere declaration that he or she did not intend to be governed by the Act and the marriage is invalid.

K. Rajah Aiyar and *G. N. Thirumalachari* for Appellant.

O. T. G. Nambiar for Respondent.

G. S. V.

Abdur Rahman, J. C. M. A. No. 214 of 1938.
24th January, 1939.

Civil Procedure Code (V of 1908), O. 39, r. 1 (a)—Application by defendant—Competency.

N.R.C.

An application under O. 39, r. 1 (*a*) of the Civil Procedure Code can be made on behalf of a defendant who is entitled to come to the Court if any such act as is referred to in the rule is committed by the plaintiff.

G. N. Chari for Appellant.

M. Patanjali Sastri for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. No. 1012 of 1936.
31st January, 1939.

Civil Procedure Code (V of 1908), S. 73—Decree for sale on mortgage—If a decree for payment of money.

A decree for sale on a mortgage cannot be regarded as a decree for payment of money within S. 73 of the Civil Procedure Code.

I.L.R. 49 Mad. 598, applied.

M. Patanjali Sastri for Petitioner.

V. Ramaswami Aiyar for Respondent.

G. S. V.

Leach, C. J. and Somayya, J. S. A. No. 430 of 1934.
2nd February, 1939.

Court-Fees Act (VII of 1870), S. 7 (v) and Sch. II, Art. 17-B —Prior mortgagee becomes purchaser of portion of property—Subsequent mortgagee becoming purchaser of the entire property subject to the early mortgage—Prior mortgagee obtaining symbolical possession—Suit for partition against subsequent mortgagee remaining in actual possession—Proper court-fees.

A obtained a mortgage decree in respect of the western portion of a house and at the subsequent sale in execution became the purchaser thereof. *B* who held a second mortgage over the whole house obtained a mortgage decree in respect of the whole house and in execution thereof became the purchaser, subject to *A's* right. *A* was put in symbolical possession of his half portion of the property. *B* who was in physical possession of the whole of the property, refused to allow *A* to enter into physical possession of his portion. A suit was brought by *A* for partition of the property and possession of his half share—and also for mesne profits.

Held, that the plaint should be stamped under S. 7 (*v*) and not Art. 17-B of Sch. II of the Court-Fees Act.

K. Balasubramania Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

T. Krishna Rao for *The Government Pleader* on behalf of the Government.

G. S. V.

Wadsworth, J. S. A. No. 275 of 1935.
2nd February, 1939.

Limitation Act (IX of 1908), Arts. 120 and 131—Applicability—Remuneration attached to office—Suit against Government to establish right to office—Nature of—Commencement of limitation.

In a dispute as regards mutawallship of a mosque the second defendant was registered in revenue records of Government, as the holder of the office. A suit for a declaration that the plaintiff was the duly appointed mutawalli, yeomiadhar and Katheeb of the mosque, and also for the relief, that the first defendant, the Secretary of State should be directed to register the plaintiff as the yeomiadhar entitled to receive the yeomiah allowance and pay such allowance was brought within a period of six years of the date on which the Board of Revenue finally rejected the plaintiff's application for registration

Held, that the essential claim in the suit is the establishment of the title of the plaintiff to the office to which a remuneration is attached and not the establishment of the liability of the Government to make the recurring payment; Art. 131 does not apply. The right to sue under Art. 120 accrues when the Government recognised the 2nd defendant as the holder of the office entitled to receive the emoluments and not when the plaintiff's final appeal to the Board of Revenue was rejected.

39 M.L.J. 492, applied.

A.I.R. 1938 Mad. 47, discussed.

Leave to appeal granted.

B. Pocker for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

G. S. V.

Leach, C. J. and Somayya, J. C. M. P. Nos. 5512, 5513 and
8th February, 1939. 5514 of 1938.

Civil Procedure Code (V of 1908), O. 45, r. 4—Scope—Two different suits tried together—A common question existing for them—Permission for consolidating the suits—If can be granted.

Two different suits which had a common question were tried together in the trial Court; but there were separate judgments. The appeals against them were heard together and dealt with in one judgment. An application was filed for consolidating the two appeals. The suits, if consolidated, would comply with the condition with regard to value.

Held, that the fact that there is a common question does not entitle the petitioner to a certificate permitting an appeal, when there are other questions which are not common and the application does not come under O. 45, r. 4. Under O. 45, r. 4, the Court has got a discretion and is not bound to grant an order for consolidation.

T. R. Venkatarama Sastri and *B. V. Visvanatha Aiyar* for Petitioner.

A. Srirangachariar for Respondent.

G. S. V.

Lakshmana Rao, J. Cr. R. C. No. 835 of 1938.
9th February, 1939.

Motor Vehicles Rules of 1928, Rr. 175 and 176—Driver of bus—Liability for overloading.

The driver of a motor bus is not mentioned under Rr. 175 and 176 of the Motor Vehicles Rules of 1928 and cannot be made liable for the offence of overloading and for violating the condition of the 'G' permit issued under the Motor Vehicles Rules of 1923, regarding the maximum number of passengers that can be carried in a bus.

A. S. Sivakaminathan for Petitioner.

V. L. Ethiraj (*Public Prosecutor*) for the Crown.

G. S. V.

Burn and Stodart, JJ. C. M. A. No. 376 of 1937.
2nd February, 1939.

Execution—Execution proceedings—Permission of Court to sell property privately—Sale in pursuance of—Sale proceeds not deposited within stipulated time but deposited later on—Sale set aside—Amount deposited and drawn out by the decree-holder—Necessity to refund before execution.

In execution of a decree obtained by the Government against *A*, the properties belonging to *A* were attached and brought to sale. *A* sought the permission of the Court to sell his properties privately and deposited the decree amount in Court. The Court granted permission to *A* to sell the properties on condition that he deposited a certain amount immediately and on his undertaking to deposit the balance within a stipulated time. In pursuance of the permission *A* sold the property to *B* and deposited a portion of the amount as per the order of the Court but failed to deposit the balance within the stipulated time. The Government after drawing the amount deposited in Court filed an application praying for the sale of the property already attached. The lower Court set aside the sale on the ground that there was not a strict compliance with the order of Court but directed the Government to restore the money which it took from Court. Against that the Government preferred an appeal. *B* filed an application to be impleaded as a party respondent to the appeal and he was brought on the record.

Held, on appeal, that the order of the lower Court was correct and that the Government was bound to deposit back the money.

The Government Pleader (B. Sitarama Rao) for Appellant.

M. Krishna Barathi for Judgment-debtor.

A. S. Srinivasa Aiyar and *S. Seshadri* for the party Respondent.

S. V. V.

Leach, C. J. and Somayya, J. L. P. A. No. 117 of 1936.
6th February, 1939.

Hindu Law—Joint family—Separate property—Dispute as to—Onus of proof.

Where the income from the family properties was not sufficient to maintain the family and the father utilised part of his salary for that purpose and claimed certain items of properties as his separate properties as having been acquired from savings representing the accumulation of the balance of his salary and asserted his rights over them,

Held, that the onus is not on the earning member of the joint family to show that he kept his earnings separate but is on the

other members to prove that the earning member had relinquished his right over his separate income. As this onus was not discharged, the properties claimed by the father constitute his separate properties.

S. Panchapagesa Sastri and *P. J. Kuppanna Rao* for Appellant.

L. A. Gopalakrishna Aiyar for Respondent.

G. S. V.

Pandrang Row, J. C. R. P. No. 806 of 1938.
16th February, 1939.

Madras Estates Land Act (I of 1908), S. 205—Revision by District Collector—Order wrong on merits—Interference by High Court under S. 115, Civil Procedure Code.

A petition was filed before a Deputy Collector under Ss. 131 and 192 of the Estates Land Act and S. 47, Civil Procedure Code, to declare a certain sale held in execution of a rent decree, a nullity. The Deputy Collector did not deal with the petition judicially as required by law but in a purely administrative manner and dismissed the petition. The District Collector on revision interfered with the order under the power vested in him under S. 205 of the Act.

Held, that though the order of the District Collector may be wrong on the merits he has jurisdiction to entertain a revision petition and the High Court will not interfere with that order in revision under S. 115, Civil Procedure Code.

T. Kumaraswamiah for Petitioner.

P. Gopolaratnam Naidu and *P. Srikantam* for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 348 of 1935.
20th February, 1939.

Limitation Act (IX of 1908), S. 6 (3) and Art. 144—Sale of minor's property by Court guardian—Death of minor—Suit for possession by legal representative within three years from—Adverse possession of defendant for more than twelve years—Effect.

The Court guardian of a minor conveyed a certain plot of the minor's property comprised in certain boundaries to *B* in 1912. The minor died while still a minor and was succeeded by his mother as his heir. The mother claimed recovery from *B* of the extent alleged to have been encroached upon by *B* after his purchase in 1912. The suit was brought in 1931, within three years of the death of the minor, the last proprietor.

Held, the suit cannot be held to be barred in spite of the adverse possession of *B* beyond a period of 12 years.

P. Somasundaram for Appellant.

Kasturi Seshagiri Rao for Respondent.

G. S. V.

Leach, C.J. and Somayya, J. C. M. P. No. 551 of 1939.
22nd February, 1939.

Civil Procedure Code (V of 1908), O. 40, r. 1—Partition suit—Appointment of receiver—Sale by direction of Court—Proper notice to be given by receiver.

In a suit for partition of the properties of a joint Hindu family a receiver was appointed to sell a portion of the lands allotted to one of the members to discharge his liability. The receiver gave a week's notice of the sale, and held it.

Held, that the receiver should, unless there are special circumstances or he is otherwise directed by the Court, follow the rule laid down in the Civil Procedure Code, and give not less than thirty days' notice, though the parties may agree to a lesser period.

K. Rajah Aiyar and *N. A. Krishna Aiyar* for Petitioner.

T. R. Venkatarama Sastri, S. Ramanujam, T. R. Srinivasa Aiyangar, S. Venkatarama Aiyar, A. V. Viswanatha Sastri, K. R. Rangaswami Aiyangar, K. Krishnaswami Aiyangar and *G. Jagadisa Aiyar* for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. S. A. Nos. 471 to 473 of 1935.
23rd February, 1939.

Madras Estates Land Act (I of 1908), S. 3 (ii)—Suit for rent under S. 77—Land occupied by houses though alleged by the landholder to be ryoti—No proof of payment of rent—Burden of proof.

Where the land was originally cultivable land but ceased to be used for agricultural purposes and was occupied by houses, though there is no proof of the consent of the landholder to this arrangement,

Held, that the fact that the rent was not paid goes a long way to support the inference that the occupation of the land by houses was with the consent of the landholder.

Held, further, that it was incumbent upon the plaintiff in order to establish his claim for rent to prove that the land is ryoti land and that the money which he claims is rent within the definition in S. 3 (*ii*) of the Madras Estates Land Act.

(1938) 2 M. L. J. 829, followed.

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Appellants.

A. S. Srinivasa Aiyar and *S. Seshadri* for Respondents.

S. V. V.

Gentle, J. S. A. No. 510 of 1935.

23rd February, 1939.

Civil Procedure Code (V of 1908), S. 47 and O. 21, r. 95—Bar of suit—Mortgagee purchasing properties in pursuance of mortgage decree—Defendant purchasing those properties in execution of another decree subject to mortgage subsequent to mortgage suit—Application against defendant to remove obstruction—Dismissal of, on ground of limitation—Suit against defendant for possession—Proper procedure.

A, a mortgagee, purchased properties mortgaged to him in a sale held in pursuance of the mortgage decree obtained by him. In execution of a Small Cause Court decree passed against the mortgagor subsequent to the mortgage decree in the mortgage suit, the mortgaged properties were put up for sale and purchased by *B*, subject to the mortgage. A filed a petition under O. 21, r. 97, Civil Procedure Code, to prevent resistance caused by *B* and to gain possession and the petition was dismissed not on merits but as being barred under Art. 167 of the Limitation Act. *C* acquired the properties from *A* and brought a suit for possession against *B*.

Held, that *B* was a representative of the party to the suit within the contemplation of S. 47 (1) of the Civil Procedure Code, and the suit brought by *C* is barred. *C* was entitled to take proceedings under O. 21, r. 95 of the Civil Procedure Code, as the continuance by *B* in occupation of the premises is a wrong *de die in diem* and *C* should be granted leave under S. 47 (2) to treat the proceedings in the suit as an application under O. 21, r. 95, Civil Procedure Code.

(1937) 2 M.L.J. 359 (P.C.), relied on.

I.L.R. 1938 Bom. 649, followed.

B. Pocker and *T. R. Abdul Ghani* for Appellant.

N. Panchanatha Aiyar and *R. Krishnaswami Aiyar* for Respondent.

G. S. V.

Varadachariar and Gentle, JJ. Appeal No. 443 of 1935.
3rd February, 1939.

Hindu Law—Debts—Member of agriculturist family engaging in trade—Possibility of loss—Debts incurred if avyavaharika.

The fact that a member of an agriculturist family engages in trade will not itself make the debts incurred by him *avyavaharika*. The possibility of loss sometimes accruing will not make the debts arising as a result of trade, illegal or immoral debts, within the meaning of the Hindu law.

K. Venkatarama Raju for Appellants.

G. Lakshmanna and *G. Chandrasekara Sastri* for Respondents.

G. S. V.

The Chief Justice and Somayya, J. C. M. S. A. No. 166 of 1936.
9th February, 1939.

Provincial Insolvency Act (V of 1920), S. 28 (2)—Joint Hindu family—Insolvency of father—Attachment of son's shares before the sale thereof by Official Receiver—Power of Official Receiver—Leave of Insolvency Court—If necessary for valid attachment.

The father of a joint Hindu family was adjudicated an insolvent. Before the Official Receiver sold the shares of the sons for the benefit of the creditors, those shares were attached in execution of a decree obtained by their creditors.

Held, that S. 28 (2) of the Provincial Insolvency Act refers only to the property of the insolvent. Proceedings can be taken in respect of the sons' interest in the family property without the leave of the Insolvency Court and as a result of the attachment, the Official Receiver loses the power to sell the property of the sons for the lawful debts of the insolvent father.

I.L.R. 51 Mad. 342, 66 M.L.J. 277 and C. M. A. No. 253 of 1936, relied on.

(1938) 1 M.L.J. 824, disapproved.

M. Patanjali Sastri and *T. K. Sundararaman* for Appellant.

M. Murugappa Chettiar, K. Sankara Sastri and *T. M. Ramaswami Aiyar* for Respondents.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 756 of 1935.
20th February, 1939.

Co-owner—Purchaser at auction of unspecified share—Suit against other co-owners for partition and possession—Mesne profits during period of exclusion—If can be awarded—Nature of relief to be granted.

NRC

A purchased in Court auction the undivided share of *G* and his sons in two items of properties. The balance of the shares in these items was owned by *C* and *D*, strangers to the family. After his purchase *A* obtained symbolical possession through Court and brought a suit for partition and recovery of his share in the two items together with past and future mesne profits. *C* and *D* who were in physical possession of the properties received and appropriated the entire profits to themselves. The lower Court refused to give a decree for mesne profits during the period *A* chose to be inactive.

Held, that *C* and *D* were only ordinary co-sharers or tenants in common. *A* had a right to joint possession, though not entitled to any specific items of the common properties. Though mesne profits may not be awardable *A* was entitled to relief by way of profits or compensation. There is no scope for the doctrine of laches or waiver.

I.L.R. 27 All. 88 and I.L.R. 28 All. 161, relied on.

A. C. Sampath Aiyangar for Appellant.

Respondent not represented.

G. S. V.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ.
3rd March, 1939.

C. R. P. No. 898 of 1938.

Court-Fees Act (VII of 1870), S. 7 (iv-A) and (v)—Suit for cancellation of a deed and possession—Court-fee payable—Proper mode of valuation.

A suit for the cancellation of a deed of conveyance and for possession of properties, should be valued under S. 7 (iv-A) of the Court-Fees Act but the stamp fee must be based on the market value of the properties at the time of the suit and not on the amount stated in the conveyance.

I.L.R. 59 Mad. 240, approved.

I.L.R. 53 Mad. 267 and I.L.R. 56 Mad. 212, overruled.

V. Subramaniam for Petitioner,

Y. Suryanarayana and *T. Krishna Rao* for *B. Sitarama Rao* (*The Government Pleader*) for Respondents.

G. S. V.

Varadachariar, J. C. R. P. No. 685 of 1937.
21st February, 1939.

Madras Estates Land Act (I of 1908), S. 20-A—Application under—Doctrine of res judicata—*Applicability of.*

Applications of the kind contemplated by S. 20-A of the Estates Land Act are matters to which the doctrine of *res judicata* cannot be legitimately applied. If an application under that section is dismissed by the Collector it will only be on the ground that as circumstances have not changed and no special cause is shown, there is no reason for changing his opinion.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Petitioner.

V. Viyyanna and *G. Srinivasa Aiyangar* for Respondents.

G. S. V.

Wadsworth, J. C. R. P. No 624 of 1936.

24th February, 1939.

Civil Procedure Code (V of 1908), O. 9, r. 9 and S. 141—Pauper petition—Dismissal for default—Petition under O. 9, r. 9, and S. 141—Duty of Court.

Where a petition is filed under O. 9, r. 9 and S. 141, Civil Procedure Code, on the dismissal for default of a pauper petition the Court has a duty to decide such petition on its merits and cannot decline to exercise its jurisdiction merely because there is an alternative remedy.

36 L.W. 586, relied on.

A. Rajagopala Aiyar and *P. G. Raghavendra Rao* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

G. S. V.

Wadsworth, J. C. R. P. No. 427 of 1936.

24th February, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 11 and 17—Execution petition—Decree-holder or person duly authorised not signing it—Evidence to show that the person signing was an authorised agent—Admission of petition as being in proper form—Rejection at later stage for not being verified by an authorised agent—Proper procedure.

An execution petition was filed by a rival decree-holder, claiming rateable distribution within the time allowed by S. 73 of the Civil Procedure Code. The petition was not signed by the decree-holder or a person shown to have been duly authorised by

him. No objection was taken to the frame of the petition. The petitioner adduced evidence that the person who signed and verified the petition was a partner in his firm and his authorised agent. In the later stage, the Court held it was no valid execution petition by the claimant.

Held, that the petition could not be held to be not a petition in substantial compliance with the requirements of the law and could not be dismissed as not having been verified by an authorised agent. As the petition was once treated as one in proper form it could not be rejected without giving to the petitioner an opportunity of supplying the deficiency. The petitioner was given an opportunity for the production of further evidence.

2 Lah. L. J. 104, relied on.

Ch. Raghava Rao for Petitioner.

G. Krishna Arya for Respondent.

G. S. V.

Wadsworth, J. S. A. Nos. 785 and 786 of 1935.
28th February, 1939.

Provincial Insolvency Act (V of 1920), S. 44 (1) (c)—Applicability—Forbearance to claim rights in insolvency—Fraud of insolvent—Nature of.

To bring a debt within the exception of S. 44 (1) (*c*) of the Provincial Insolvency Act, it is incumbent on the claimant to prove that there was an intentional forbearance on his part brought about by a fraud on the part of the insolvent and it is not enough to show that the insolvent's conduct was generally fraudulent (*e.g.*, in the matter of alienations in anticipation of insolvency) and that the creditor's failure to prove was due to the absence of assets, which assets might possibly have been present had the insolvent conducted himself in a more honest manner.

V. Govindarajachari and *B. V. Ramanarasu* for Appellants.

Y. Ramaseshiah for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 658 of 1935.
9th March, 1939.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 21—Plaintiff appointed as village headman by Revenue Divisional Officer and Collector—Board of Revenue appointing another—Plaintiff in possession of the office—Suit for declaration and injunction—Jurisdiction of Civil Court — Regulation I of 1803, S. 5—Power of superintendence of the Board of Revenue under—Nature of.

The plaintiff was originally appointed by the Revenue Divisional Officer and the Collector to the Office of a Village headman in a Government village, as having a better claim to the office than his rival, and he entered upon the duties of the office and was occupying it. The Board of Revenue set aside the order appointing the plaintiff and appointed the second defendant to the office as being a more desirable candidate. The plaintiff brought a suit for a declaration that he was the legal holder of the office and the appointment of the second defendant was illegal and to restrain the Government and the second defendant from interfering with his enjoyment of the office.

Held, that the Civil Court has jurisdiction to entertain the suit as the plaintiff seeks to avert a threat to his possession of the office by an unlawful act of the Board of Revenue. The order of the Board of Revenue purporting to act in second appeal or revision under S. 5 of Regulation I of 1803 and to decide a matter which according to the machinery of the Madras Hereditary Village Offices Act should have been decided by a suit under S. 13 of the Act was an illegal attempt to invade the vested rights of the plaintiff and he has a remedy by way of a suit for the relief asked for.

Obiter.—The Board of Revenue can set aside a statutory order of its subordinate in the case of a gross error attended by serious consequences for which no other remedy is provided by law, but not where the consequences are purely personal to the rival claimants.

58 M.L J. 698, I.L.R. 56 Mad. 749 and 33 L.W. 294, referred to.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellant.

B. Sitarama Rao (The Government Pleader), V. Krishnamachariar and *P. G. Raghavendra Rao* for Respondents.

G. S. V.

Burn and Stodart, JJ. R. T. No. 12 of 1939.
9th March, 1939.

Evidence Act (I of 1872), S. 30—Co-accused—Confession at preliminary enquiry—Admissibility against the other co-accused.

Where a confession was made by an accused implicating his co-accused for the first time at the preliminary enquiry, in the dock in the presence of the latter and at the Sessions trial it was proved under S. 287 of the Criminal Procedure Code, by the Magistrate's *verbatim* record of it,

Held, that as the co-accused had as much opportunity of explaining or rebutting the incriminating statement as if it had been made before the preliminary enquiry and proved at that enquiry and is in no way prejudiced, it can be taken into account.

R. Sadasivan Pillai for the Accused.

A. S. Sivakaminathan for *V. L. Ethiraj* (*The Public Prosecutor*) on behalf of the Crown.

G. S. V.

Wadsworth, J. C. M. P. No. 4070 of 1938 in
13th March, 1939. S. A. No. 358 of 1934.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (d)—Two separate plots included in a mortgage—One of them with building in it—The other being a vacant site at the time of mortgage—House constructed later on—If it is house property—Mortgage debt—If comes within the operation of the Act.

Two plots separately demarcated were comprised in a mortgage. In one of them when the mortgage was executed, there was a shop building. The other was a vacant site (*Kali manai nilam*) though destined for building purposes. A house was constructed on it since the mortgage came into force.

Held, that the vacant site cannot be properly described as 'house property' and the inclusion of the unoccupied land takes the mortgage debt out of the exception recited in S. 4 (*d*) of the Act and the debt as a whole comes within the mischief of the Act.

Even if land is suitable for building purposes and there is an intention to build houses upon it, it would not be considered "house property" until building operations had at any rate started.

7 I.C. 436, referred to.

A. S. Srinivasa Aiyar and *S. Seshadri* for Petitioner.

V. Ramaswami Aiyar for Respondent.

G. S. V.

Burn and Stodart, JJ. R. T. No. 21 of 1939.
14th March, 1939.

Penal Code (XLV of 1860), S. 302—Murder—Recommendation for reduction of sentence under R. 260 of the Criminal Rules of Practice—Sentence of death—If appropriate.

Where a Sessions Judge sentenced a woman to death for the murder of her new born infant and addressed the Government recommending that the sentence be reduced to a term not exceeding five years' rigorous imprisonment,

Held, that if the case of the accused was one which the Judge thought should be dealt with under R. 260 of the Criminal Rules of Practice, by reduction of a sentence, the sentence of death was quite inappropriate.

G. Balaparameswari Rao for Accused.

V. L. Ethiraj (*The Public Prosecutor*) for the Crown.

G.S.V.

Varadachariar and Gentle, JJ. Appeal No. 194 of 1935.
9th February, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 118—Evidence Act, S. 114—Execution of promissory note—Presumption as to consideration—Plaintiff suing on the note—Proof as to her inability to advance the amount recited in the note—Duty of the Court to examine transaction and ascertain the true consideration.

Where evidence has been given by a plaintiff suing upon a bill or note in which the consideration is in issue, the Court is entitled to consider the whole of the evidence given during the trial and the defendant is entitled to rely upon the facts disclosed in the plaintiff's evidence and is not confined to his own and his witnesses' testimony. Although there is a presumption that a note has been given for consideration, there is no presumption as to the quantum. Even when the instrument contains a recital regarding the amount of consideration, this is *prima facie* evidence only of such amount and does not prevent an examination by the Court of the transaction to see what the actual consideration was. The creditor is entitled to get what he can prove to have lent, "by affirmative evidence beyond the production of the note itself".

Where it is proved that the payee of a promissory note was not in a position to lend the amount recited in the note and further there is no evidence or proof of the actual amount of the advance, if any, which she made at that time, she (the payee) suing on the note is not entitled to succeed in her claim.

I.L.R. 58 Mad. 841 at 855; *Jones* v. *Thomas*, (1877) 2 Y. and C. Ex. 498 at 522: 160 E.R. 493; 31 I.C. 739 and 29 M.L.J. 236, relied on.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondents.

G. S. V.

Somayya, J. C.R.P. Nos. 295, 296 and 297 of 1936.
13th February, 1939.

Inam—Suit by zamindar against inamdar and his tenants for water taken for second crop from his tank—Liability of inamdar—Nature of—Jurisdiction of Revenue Court—Madras Estates Land Act, S. 70—Claim of zamindar against inamdar if one against a ryot.

The tenants who cultivated certain inam land under an inamdar were taking water for the first crop and also whenever available for the second crop from a zamindar's tank. The zamindar brought a suit against inamdar and the tenants in respect of water taken for the second crop raised on the suit land. The rent demanded by the inamdar from his tenants was fixed on the basis that

there would be enough water for the first crop and also for a second crop whenever rains fail.

Held, that though the entire liability to pay for the water was thrown on the tenants as between the inamdar and the cultivating tenants, the zamindar is not bound by such stipulations and the inamdar is jointly liable along with the tenants to pay for the water taken for the second crop. There is no distinction in the application of this principle between a pre-settlement inam and a post-settlement inam. The zamindar's suit cannot be viewed as a claim on a tort but is based on an implied engagement between him and the inamdar that whenever there is water available, the inamdar may take the water but on condition of paying for it.

The suit for the recovery of payment for water against the inamdar or against the other tenants is not one for recovery of rent from a 'ryot' as defined in S. 77 of the Madras Estates Land Act and does not lie in the Revenue Court.

Ch. Raghava Rao for Petitioner.

T. Satyanarayana and *M. Appa Rao* for Respondents.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 778 of 1935.
20th February, 1939.

Transfer of Property Act (IV of 1882), Ss. 41 and 115—Gift by husband to wife of certain property—Sale of the same property by him to plaintiff—Plaintiff alleging that vendor's wife took prominent part in the negotiations preceding the sale—Suit by plaintiff for declaration and injunction—Wife if barred from setting up her title to the property—Nature of estoppel under Ss. 41 and 115.

Certain property originally belonged to the second defendant who executed a deed of gift in favour of his wife, the first defendant. The second defendant sold the property to the plaintiff without any mention of the above deed of gift. The plaintiff obtained possession of the property. The first defendant subsequently sold the property in favour of the third defendant. The plaintiff then brought a suit for a declaration of title to the suit property and an injunction to restrain the defendants from interfering with her enjoyment of that property. The plaintiff deposed during the trial that the first defendant along with her husband took part in the negotiations which preceded the purchase and she took part in the settlement of the price andkept back from her (the plaintiff) the knowledge of the gift deed and her title under it. The plaintiff contended that the first defendant was estopped from putting forward her title by reason of her conduct in connection with the purchase of the property by her (the plaintiff). The

lower Courts held that there was no estoppel under S. 41 of the Transfer of Property Act inasmuch as the plaintiff must be deemed to have had constructive notice of the gift which was a registered document by reason of the definition of 'notice' in S. 3 of the above Act.

Held, that the conclusion so far as S. 41 of the Act is correct. But if the conduct of the first defendant was such as was deposed to by the plaintiff, it was not a case of a person merely standing by, but it was a conduct which amounted to representation which had been acted upon by the plaintiff to her prejudice. A perfect case of estoppel would then be made out under S. 115 of the Transfer of Property Act, though this ground of estoppel falls outside S. 41 of the Act,

I.L.R. 56 All. 582, relied on.

S. Panchapagesa Sastri and *T. G. Raghavendra Rao* for Appellant.

T. E. Ramabadrachari and *K. Rama Aiyangar* for Respondent.

G. S. V.

Wadsworth, J. C. R. P. No. 981 of 1936.
20th February, 1939.

Succession Act (XXXIX of 1925), S. 304—Certain creditors of deceased intermeddling with his estate—Distribution of assets by them among creditors—Right of creditor not receiving payment in that distribution—Liability of creditors to refund—Extent of.

Certain creditors of a deceased person took possession of his stock-in-trade and paid their own debts and certain other debts due by him. A creditor who was not paid sued them and the widow of the deceased.

Held, that these creditors are executors *de son tort*. To the extent they have paid valid debts of the deceased proportionately to the assets available, these payments have been made 'in due course of administration.' They should be directed to pay to the plaintiff only the rateable amount which would have been due to him had his debt been taken into consideration at the distribution of the assets amongst the creditors made by the intermeddling creditors. They should not be directed to bring into Court the full value of the assets of the deceased which had come into their hands for the satisfaction of the plaintiff's debt.

I.L.R. 28 Mad. 350, referred to.

V. Govindarajachari for Petitioner.

Ch. Raghava Rao for Respondent.

G. S. V.

Burn and Stodart, JJ. C.M.A. Nos. 637 and 638 of 1938.
22nd February, 1939.

Civil Procedure Code (V of 1908), O. 38, r. 5—Application under—Conversion of an execution petition into—Propriety—No existence of personal decree—Dismissal of execution petition.

Where there was no personal decree but still an execution petition was filed for execution as if the decree were a personal decree,

Held, that the execution petition should be necessarily dismissed and could not be converted into an application under O. 38, r. 5 of the Civil Procedure Code.

P. Satyanarayana Rao and *M. Balakrishnamurthi* for Appellants.

G.S.V.

Abdur Rahman, J. C. M. A. No. 253 of 1937.
24th February, 1939.

Civil Procedure Code (V of 1908), S. 11, Expl. IV—Might and ought—Different grounds of attack—Both suits for ownership of same properties—First suit as members of joint family—Second suit as reversioners—If maintainable—Litigating under the same title.

H and his sons brought a suit against *H's* brother's widow and his son by a predeceased wife for partition and possession of properties, claiming as joint tenants of his deceased brothers. The suit was dismissed on the ground that the partition between *H* and his brothers had taken place before the suit. *H* died and a subsequent suit was brought by his two sons, who now based their title on their father being the nearest reversioner of his brothers and solely entitled as such to their properties.

Held, that the capacity of the plaintiffs was the same in both cases. The grounds of attack, *viz.*, the claim to have acquired properties either as survivors or heirs could have been joined in the same suit without any hindrance to the trial of the suit and could not be characterised as inconsistent but were merely alternative. The title which the plaintiffs claimed in both suits was that of ownership in regard to certain properties though for different shares and two grounds of the same title were successively put forward. The present plaintiffs were bound to include in their first suit the ground of attack which they put forward in the later suit and which was obviously within their knowledge. Not having done so, they could not be permitted to come to Court as reversioners, for the second time.

11 M.I.A. 50, 11 Beng. L.R. 158, I.L.R. 20 Cal. 79, A.I.R. 1925 P.C. 55, I.L.R. 46 Mad. 135 and I.L.R. 13 Lah. 195, referred to.

V. S. Narasimhachar for Appellant.

Kasturi Seshagiri Rao for Respondent.

G. S. V.

Lakshmana Rao, J. Crl. R. C. No. 938 of 1938.
3rd March, 1939.

Madras Suppression of Immoral Traffic Act (V of 1930), S. 5 (1)—Conviction of inmate of brothel—Legality of.

An inmate of a brothel cannot be convicted under S. 5 (1) of the Madras Suppression of Immoral Traffic Act.

V. L. Ethiraj (The Public Prosecutor) for the Crown.

G. S. V.

Lakshmana Rao, J. Crl. R. C. Nos. 914 and 915 of 1938.
8th March, 1939.

Child Marriage Restraint Act (XIX of 1929) and Criminal Procedure Code, S. 188 Proviso—Offence under the Child Marriage Restraint Act committed in French territory—Inquiry into charge—Essentials for.

Where an offence under the Child Marriage Restraint Act is alleged to have been committed in French territory, the charge cannot be inquired into in the absence of the certificate of the Political Agent or sanction of the Provincial Government.

D. Narasaraju for Petitioner.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Respondents.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

G. S. V.

Leach, C. J. and Patanjali Sastri, J. L.P.A. No. 80 of 1937.
15th March, 1939.

Specific Relief Act (I of 1877), S. 42 Proviso—Suit for declaration of title only as regards certain jewels—Jewels in the possession of Court—No prayer for consequential relief asked for—Suit if maintainable.

A plaintiff brought a suit for a declaration that he was the absolute owner of certain jewels which were in the possession of the Court of a Sub-Divisional Magistrate. No prayer for consequential relief was asked for.

Held, as the jewels were in *custodia legis*, at the time of the institution of the suit, all that was necessary was a declaration of title and the Court must deliver them to the person who shows title. It was not necessary for the plaintiff to ask for anything more than a mere declaration and the suit as framed is maintainable.

I.L R. 27 Mad. 591, I.L.R. 36 Mad. 62 and I.L.R. (1938) Lah. 63 (P.C.), relied on.

38 L.W. 194, disapproved.

K. Rajah Aiyar and *C. S. Krishnamurthi* for Appellant.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Respondent.

G. S. V.

Abdur Rahman, J. Check Slip No. 471 of 1936 in
17th March, 1939. C.M.A. No. 329 of 1938.

Court-Fees Act (VII of 1870), Sch. II, Art. 11—Preliminary decree passed in partition suit—Question of future mesne profits left open—Final decree passed and possession of properties taken by plaintiffs—Application under O. 20, r. 12 to enquire into future mesne profits—Rejection of—Appeal against order refusing to hold such enquiry—Court-fee payable—Order of rejection if amounts to a decree.

In a suit for partition and possession which also included a prayer for the grant of future mesne profits, a preliminary decree was passed. But the question of future mesne profits was ordered by the Court to be left open. The partition of property was followed by a final decree. After the plaintiffs obtained possession in execution of this decree, they applied to the Court under O. 20, r. 12 of the Civil Procedure Code, asking for an enquiry into the future mesne profits and for an order to direct the defendants to pay what was found to be due from them. This application was dismissed by the District Munsif. An appeal was preferred by the plaintiffs against this order to the District Judge and a court-fee of one rupee was affixed on the appeal.

Held, that the order rejecting the application does not fall within the definition of a 'decree' as defined in S. 2 (*d*) of the Civil Procedure Code. The plaintiffs cannot be required to estimate the value of the relief for future mesne profits either in the trial Court or in the appellate Court. The application made under O. 20, r. 12 or an appeal from an order rejecting that application cannot be regarded as having been made in or arising from an order in execution. The appeal was correctly valued under Art. 11 of Sch. II of the Court-Fees Act.

I.L.R. 53 Mad. 540, referred to.

K. Srinivasa Rao for Appellant.

J. V. Srinivasa Rao for Respondent.

K. R. Rama Aiyar for *The Government Pleader* (*B. Sitarama Rao*) for Government.

G. S. V.

Leach, C.J. and Patanjali Sastri, J. L. P. A. No. 74 of 1937.
16th March, 1939.

Partnership Act (IX of 1932), Ss. 69 (2) and 74—Conflict between—Suit by firm against defendant for a sum of money—Registration of firm during pendency of suit—Plaintiff if entitled to decree.

A firm filed a suit against a defendant claiming a certain sum as due from him. The firm had not been registered under the provisions of S. 58 of the Indian Partnership Act but during the pendency of the suit registration was effected. The defendant contended that the suit could not be maintained by reason of the non-compliance with the Act.

Held, that the suit should be decreed. The rights and remedies which accrued before the commencement of the Act are left entirely untouched. S. 69 (2) of the Act cannot apply but S. 74 prevails. S. 74 should not be read as being subordinate to S. 69 (2).

48 L.W. 81, I.L.R. 58 All. 495, 40 Bom.L.R. 1275 and A.I.R. 1938 Rang. 371, followed.

I.L.R. 62 Cal. 213, I.L.R. 15 Pat. 813 and I.L.R. 17 Lah. 275, not followed.

S. Ramachandra Aiyar for Appellant.

V. C. Veeraraghavan for Respondent.

G. S. V.

Newsam, J. C. R. P. No. 1074 of 1938.
17th March, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Application for stay of execution under S. 20 by the father and manager of joint family—Application under S. 19 not filed—Subsequent applications under Ss. 19 and 20 by his minor son represented by his mother—Maintainability of.

The judgment-debtor in a case was a joint family. The father and manager of that family filed a petition under S. 20 of the Agriculturists Relief Act and obtained stay of execution but failed to file an application under S. 19 for scaling down the debt. Later on, his minor son represented by his mother filed applications under Ss. 19 and 20 which were dismissed.

Held, that the order of dismissal was right. Every member of the joint family in succession cannot obtain 60 days' stay. The joint family is bound by any order passed on the application of any member or by any default committed by any member.

K. Srinivasa Rao for Petitioner.

P. Chandra Reddi for Respondent.

G. S. V.

N R C

Venkataramana Rao and Newsam, JJ. A. S. No. 49 of 1936.
24th March, 1939.

Hindu Law—Husband and wife—Denial of marriage by husband—If legal cruelty—If wife entitled to separate maintenance.

Where a husband denies to his wife her legally married status by asserting that she is not his wife, he is guilty of cruelty sufficient in law to entitle her to claim separate maintenance.

V. Govindarajachari for Appellants.

N. Rama Rao and *B. V. Ramanarasu* for Respondents.

G. S. V.

Somayya, J. C. R. P. No. 119 of 1938.
24th March, 1939.

Court-Fees Act (VII of 1870), S. 7 (v) and Sch. II, Art. 17-B—Suit to recover possession of the office of the managership in regard to a school—No relief asked for recovery of the possession of the school building and its endowments—Proper court-fee—Value for purposes of jurisdiction—Suits Valuation Act (VII of 1887), S. 4.

Where a plaintiff does not ask for recovery of possession of a school building and its endowments but asks merely for possession of the office of the managership,

Held, that the suit should be treated as one coming under Art. 17-B of the Second Schedule and not S. 7 (*v*) of the Court-Fees Act.

48 M.L.J. 571, explained as *obiter*.

I.L.R. 4 Mad. 147, relied on.

The relief of possession of the office of the managership is related to things which have a definite money value and the right to the managership certainly affects the right to be in possession of and to manage the institution and its properties. The value for the purpose of jurisdiction is the value of the properties affected.

K. Rajah Aiyar for Petitioner.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for Respondents.

G. S. V.

Pandrang Row and Abdur Rahman, JJ. A. S. No. 312 of 1935.
13th March, 1939.

Madras District Municipalities Act (V of 1920), Ss. 68 and 69—Auction by committee of Municipality—Defendant making the highest bid—Agreement signed by Chairman and others—Municipality sanctioning the agreement subsequently—Validity of agreement—Removal of rubbish by defendant in pursuance of agreement—If Municipality is entitled to relief—Contract Act, S. 65—Applicability.

In an auction held by the committee of a Municipality, the defendant gave the final bid. The agreement was signed by the Chairman and some of the members. It was not sanctioned by the Municipality until a few months after the expiry of the period for which the auction was held. In pursuance of the above agreement the defendant took delivery of the rubbish belonging to the Municipality. The Municipality sued the defendant for compensation for removing the rubbish.

Held, (1) that the sanction of the Municipality has to precede the making of a contract which exceeds Rs. 1,000 and the Council must be made aware not only of the matter in regard to which the contract would be entered into but also in regard to its terms and conditions. The highest bid of the defendant must be regarded as a mere offer. The agreement relied on by the municipality is not valid, nor can it be ratified subsequently.

(2) As the agreement was discovered to be unenforceable according to the rules laid down in Ss. 68 and 69 of the District Municipalities Act and was not illegal, S. 65 of the Contract Act comes into play. The Municipality is entitled to equitable relief under S. 65 of the Contract Act and the defendant must make compensation for removing the rubbish.

I.L.R. 29 Mad. 360 and I.L.R. 30 Mad. 290, not followed.

A.I.R. 1933 Mad. 145, I.L.R. 58 Mad. 65, 43 L.W. 39 and I.L.R. 45 All. 179 (P.C.), relied on.

M. Patanjali Sastri for Appellant.

K. Rajah Aiyar for Respondent.

G. S. V.

Somayya, J. C. C. C. A. No. 32 of 1937.
17th March, 1939.

Civil Procedure Code (V of 1908), O. 18, r. 18—Local inspection made by Judge—Judgment based solely on the impression formed at the time of—No record made as to what was found at that time—Propriety of procedure.

N R C

A suit was filed for a declaration of the plaintiff's right to light and air to a room in her house. The trial judge made a local inspection and based his judgment solely on the impression formed by him at that time and came to a conclusion quite contrary to the evidence on the point. He did not make any notes of inspection and did not place on record what it was that he found on inspection so as to enable the appellate Court to come to an independent conclusion whether his decision was right.

Held, that the procedure adopted by the trial Court was wrong.

I.L.R. 39 Mad. 501 and A.I.R. 1931 Mad. 531, referred to.

M. N. Duraiswami Aiyangar for Appellant.

K. S. Narayana Aiyar for Respondent.

G. S. V.

Pandrang Row and Abdur Rahman, JJ. A. S. No. 125 of 1938.
20th March, 1939.

*Madras Marumakkatayam Act (XXII of 1923), Ss. 41 and 43—Construction—'Tarwad' in S. 43 (4)—Registration of main tarwad as impartible—*Tavazhi *of the tarwad possessing separate properties—Applicability of Chapter VI—Suit for partition of those properties—Maintainability.*

After a marumakkatayam tarwad has been registered as impartible, under S. 43 of the Marumakkatayam Act, a *tavazhi* of the tarwad is governed by the provisions of Ch. VI of the Act and a suit for partition of the separate properties of the *tavazhi* is maintainable under S. 41.

'Tarwad' in S. 43 (4) means the tarwad which was actually registered as impartible and nothing more.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Appellants.

T. R. Venkatarama Sastri, A. Kuttisankara Menon, K. V. Gopalakrishnan Nair, M. Chinnappan Nair and *A. P. Kuttisankara Menon* for Respondents.

G. S. V.

King and Abdur Rahman, JJ. A. S. No. 77 of 1935.
25th January, 1939.

Hindu Law—Impartible estate—Illegitimate son of previous zamindar—If entitled to maintenance under Hindu Law.

In a suit for maintenance by the illegitimate son of the previous zamindar of an impartible estate,

Held, apart from special custom there is no right under Hindu Law for an illegitimate son to claim maintenance from an impartible estate. There is no coparcenary in an impartible estate.

Observations in 67 M.L.J. 274=L.R. 61 I.A. 286=I.L.R. 56 All. 468 (P.C.), treated as *obiter dicta* and distinguished as a case relating to succession.

35 M.L.J. 392=L.R. 45 I.A. 148=I.L.R. 41 Mad. 778 (P.C.), followed.

Sir Alladi Krishnaswami Aiyar and *S. Nagaraja Aiyar* for Appellant.

T. S. Swaminathan for Respondent.

K. S.

Venkataramana Rao and Newsam, JJ. A. S. No. 444 of 1935.
6th March, 1939.

Negotiable Instruments Act (XXVI of 1881), Ss. 9, 30 and 93—Hundi—Endorsement by payee—Transfer of debt by a letter—Undertaking given to bear the loss resulting from transfer—Suit by transferee against drawer of hundi—If hundi was taken with notice of dishonour—Liability of drawer's son.

The payee of a hundi endorsed it in blank and delivered it to the plaintiff after the hundi had been dishonoured by non-payment. Along with the delivery of the hundi to the plaintiff a letter was given by the payee to the plaintiff asking him to collect the hundi amount and pay himself the mortgage debt due by the payee to the plaintiff. At the time of transfer, he undertook that he would bear the losses resulting from the transfer. The plaintiff brought a suit against the drawer of the hundi who contended that he was not liable as the hundi was dishonoured by non-payment and no notice of dishonour was given to him.

Held, that it cannot be said that the endorsee was conscious that the hundi was dishonoured before he took the transfer. He cannot be deemed to have taken it with notice of dishonour. So he is a holder in due course and is entitled to enforce the hundi against the drawer.

N K C

There was a transfer of the debt apart from the hundi by reason of the letter and therefore the plaintiff can recover on the debt from the son of the drawer.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *T. M. Ramaswami Aiyar* for Appellant.

K. Rajah Aiyar and *S. Narasinga Rao* for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 620 of 1935.
21st March, 1939.

Civil Procedure Code (V of 1908), S. 11—Bar of res judicata *—Two suits tried together—Major suit including the subject-matter of the minor suit—Common judgment—Appeal preferred against the decree in the major suit but not against the other decree.*

Where there are two contemporaneous suits overlapping one another and disposed of by a common judgment and an appeal is filed only against the decree in the major suit which includes the whole of the subject-matter of the minor suit and is between the same parties, the decree in the minor suit against which no appeal is preferred cannot operate as *res judicata* in the appeal against the major decree.

S. A. No. 1643 of 1922 and I.L.R. 29 Mad. 333 (F.B.), followed.

I.L.R. 46 Mad. 895 (P.C.), referred to.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

K. Kameswara Rao for Respondents.

G. S. V.

Newsam, J. C. R. P. No. 909 of 1938.
31st March, 1939.

Civil Procedure Code (V of 1908), S. 132—Persons exempt from appearance in public—Nature of exemption—Appearance before Judge in a place chosen by him.

Persons who according to the customs and manners of the country ought not to be compelled to appear in public are exempt from appearance in public Court. But they are not exempt from appearing before the judge in a private place, which must be of his own choosing and within his discretion, not of their choosing.

Ch. Raghava Rao for Petitioner.

V. Rangachari for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 873 of 1935.
6th April, 1939.

Execution petition — Judgment-debtor's wife filing claim petition under O. 21, r. 57—Dismissal of execution petition—Legal representative of judgment-debtor filing fresh application—Fresh claim petition by judgment-debtor's wife successful—Petition whether barred.

R held a decree against *P* and in execution attached certain properties. *P's* wife *U* filed a claim petition but that was rejected. Then *R* died and the Court presumably acting on the view as held in I.L.R. 50 Mad. 1, dismissed the execution application in 1929. *R's* wife *A* filed another execution application and prayed for fresh attachment. *U* filed another claim petition which was successful. The lower courts held that since *U* did not file a suit under O. 21, r. 63, to set aside the order on her claim petition in *R's* attachment, she was barred from maintaining the present claim petition. In that view *A's* suit was decreed by both the Courts.

Held; that when the Court dismissed the execution application in 1929, it did not do so for statistical purposes but for the reason that the execution petition after *R's* death was not maintainable and *R's* legal representative must come by way of a fresh execution application. O. 21, r. 57 is not exhaustive of instances of cessation of attachment and hence the attachment did terminate on the dismissal of *R's* execution petition. In that view, *U* was not bound to file a suit to set aside the order dismissing her claim and the present claim petition in *A's* execution was not barred.

I.L.R. 50 Mad. 1 and I.L.R. 55 Mad. 352 (F.B.), referred to.

48 M.L.J. 616 and I.L.R. 56 All. 537 (F.B.), followed.

R. Visvanathan and *T. R. Srinivasan* for Appellant.

R. Desikan for Respondent.

K. C.

The Chief Justice and S. A. No. 404 of 1934.
Patanjali Sastri. J.
17th April, 1939.

Hindu Law—Adoption of daughter's son—Dispensing with datta homam—Whether texts permit.

The authenticity and authority of the text of Yama to the effect that 'the homa or the like is not necessary in the case of adoption of the daughter's son, or the brother's son; by the verbal

gift alone that is accomplished' have been accepted in a long course of decisions.

I.L.R. 2 Bom. 83, I.L.R. 6 All. 276, I.L.R. 24 Bom. 218, 20 C.W.N. 19, I.L.R. 17 All. 294, I.L.R. 21 All. 412 (P.C.) and I.L.R. 39 Bom. 441 (P.C.), referred to.

Hence, in order to establish a valid adoption of a daughter's son even in the case of a Brahmin family, the performance of datta homam is not essential. The contention that the text relates to a putrika putra and dwayamushyayana adoption negatived.

Per *Chief Justice.*—In view of the observation in I.L.R. 39 Bom. 441 at 465 (P.C.) and bearing in mind that in I.L.R. 11 Mad. 5 (F.B.) there was no express limitation of the decision in 4 M. H.C.R. 165, it is arguable that the latter decision which holds that dattá homam is not essential for a valid adoption in any case still stands.

Per *Patanjali Sastri, J.*—As the prescribed ceremony has been held to be necessary to ensure to the adopted son competence to perform the obsequies with efficiency [I.L.R. 11 Mad. 5 at 9 (F.B.)] and as the daughter's son already possesses that competence [*vide* 48 L. W. 887 at 891 and I.L.R. 50 All. 375 at 390 (P.C.)], the adoption of a daughter's son without performance of datta homa is valid on that ground also.

K. S. Desikan for Appellant.

K. Rajah Aiyar, R. Visvanathan and *V. Ramaswami* for Respondent.

K. C.

Leach, C. J. and Patanjali Sastri, J. L.P. A. No. 41 of 1937.
17th April, 1939.

Hindu Law—Succession—Sons of unmarried woman—Father unknown—If descendants of the sons "sagothra sapindas".

A and *B* were the sons of *C*, an unmarried woman and it was not known who their father was. *B's* grandson died leaving his father's sister's sons and his mother who inherited his estate. *A's* son claiming to be a reversioner sued for a declaration that an alienation by the mother of *B's* grandson was not binding on the reversion.

Held, it being impossible to say that *A's* son and *B's* grandson were descendants of a common ancestor there is no *sagothra sapindaship* but only a cognate relationship and the paternal aunt's sons had a preferential claim to succeed.

8 M.I.A. 400, referred to.

45 L.W. 153=(1937) 1 M.L.J. 268, affirmed.

S. S. Ramachandra Aiyar for Appellant.

S. Ranganatha Aiyar for Respondent.

K. S.

Somayya, J. C. M. S. A. Nos. 38 and 39 of 1938.
28th April, 1939.

Provincial Insolvency Act (V of 1920), S. 4—Application under—Prior decision of Civil Court on same matter—Effect— Res judicata.

A creditor who had filed a suit against a father and his four sons obtained an order for attachment before judgment of all the family properties. The father applied for and got himself adjudicated insolvent shortly after the suit was decreed. After adjudication the decree-holder filed in 1929 a petition in the Munsif's Court to bring the attached properties to sale. Early in 1930 the Official Receiver sold some of the properties and applied for stopping the sale of the other properties in execution and for delivery of properties to him. The sale was stopped and the execution petition was struck off. Then the Insolvency Court directed the receiver after payment of the expenses of the decree-holder to distribute the balance among the creditors. The decree-holder filed a petition praying that the receiver be directed to remit to the Munsif's Court ⅘th of the sale proceeds representing the sons' shares. The receiver sent a letter to the Munsif saying that he had distributed the amount according to the order of the Insolvency Court and so could not comply with the prayer. The Munsif after hearing arguments held that the receiver should remit the sons' shares. The receiver moved the Insolvency Court

for directions and obtained an order that the decree-holder should apply to the Insolvency Court. The decree-holder did not do so but applied to the Munsif for committing the receiver for contempt. The receiver applied under S. 4 of the Provincial Insolvency Act to the Insolvency Court for a decision that the sons' shares vested in him and were not liable to be transferred to the Munsif's Court. The decree-holder opposed the petition but both the Subordinate Judge and the District Judge held in favour of the receiver. On appeal,

Held, the order of the Munsif directing the receiver to remit the ¼th share of sale proceeds was final and binding on the receiver. The receiver appearing in a Civil Court was only a suitor and not entitled to send a report but must file a counter affidavit or written statement. If he was dissatisfied with the Munsif's decision the proper course was to appeal and not to apply in the Insolvency Court under S. 4 of the Provincial Insolvency Act and in the proceedings in the Insolvency Court the Munsif's decision would be *res judicata*. The order of the Insolvency Court directing the decree-holder's expenses to be paid in priority did not negative his right to the sons' shares.

A. C. Sampath Aiyangar for Appellant.

K. V. Ramachandra Aiyar for the Official Receiver-Respondent.

K. S.

Wadsworth, J. S. A. No. 842 of 1935.
28th April, 1939.

Indian Contract Act (IX of 1872), S. 30—Pronote for losses incurred in gambling—If enforceable.

Where a pronote is executed for losses incurred in gambling there is no lawful consideration and it is void under S. 30 of the Indian Contract Act. Where the pronote is between the same parties it is in no sense collateral to the gambling and a suit on such a pronote is not maintainable.

V. Govindarajachari and *K. V. Gopalaswami* for Appellant.

P. Somasundaram and *B. V. Subramaniam* for Respondent.

K. S.

[END OF VOLUME.]

THE

MADRAS LAW JOURNAL.

I] JANUARY [1939

NOTES OF INDIAN CASES.

JETHA LAL LAXMI CHAND SHAH *v.* AMRITA LAL OJHA, I.L.R. (1938) 2 Cal. 482.

The question in this case is whether in the case of an arbitration governed by the second schedule of the Civil Procedure Code, the Court has power to extend the time for the making of the award after the award has been actually made. Though the question is a short one, the answer to it is not free from doubt.

The difficulty is caused more by the terms of para. 15 (1) (*c*) of the second schedule than even para. 8. Para. 15 takes the place of S. 521 of the Civil Procedure Code of 1882 which was worded somewhat differently to the effect that no award would be valid unless made within the period allowed by the Court. The present language of the relevant portion of para. 15 is that no award shall be set aside except on the ground of the award having been made after the expiration of period allowed by the Court. Under the old Code, it was held by the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar*[1] that the Court had no power to extend the time after the award was actually made, though in that case no application was made for any such extension of time and the observations of the Privy Council to that effect were not strictly necessary. Consequent on the decision of the Privy Council it was uniformly held in India that under the Code of 1882,

1. (1891) L.R. 18 I.A. 55: I.L.R. 13 All. 300 (P.C.).

the Courts had no power to extend time after the award had been made.

This view could not be sustained on the language of para. 8 of the second schedule of the present Code, because under the similar provisions of the Common Law Procedure Act and under S. 9 of the English Arbitration Act of 1889 and S. 12 of the Indian Arbitration Act, it has been held that the Courts have power to extend time even after the award has been made. (See *Lord* v. *Lee*[2], *May* v. *Harcourt*[3], *Knowles & Sons, Ltd.* v. *Bolton Corporation*[4], *Tejpal Jamunadas* v. *B. Nathmull Company*[5] and *Shivji Poonja Kothari* v. *Ramjimal Babulal*[6].)

The question therefore remains whether by the change of the language in the present para. 15 (1) (*c*), the Court has power to extend time after the award has been made, a power which it did not possess under the old Code. The decisions in *Shib Krishna Dawn & Co.* v. *Satish Chunder Dutt*[7] and *Gopalji Kallianji* v. *Chhaganlal Vitthalji*[8] have held that the alteration does not make any difference while in *Sri Lal* v. *Arjun Das*[9], the Calcutta High Court inclined to a different view. In *Patto Kumari* v. *Upendra Nath Ghosh*[10] and the case under notice, the learned judges have held that after the change effected in the language in the present Code of Civil Procedure, the Court can extend the time even though an award has been made already. This view has the merit of assimilating the law of arbitration under the Civil Procedure Code with that under the Arbitration Act as noticed above. If the principle is as pointed out by Lord Blackburn in *Lord* v. *Lee*[2], that the order of the Court has the effect of ratifying the want of authority of the arbitrators as in the case of an agent, it has the effect of validating it from the beginning as if the extended time was inserted originally by the Court for making the award. Further, as pointed out by the Patna High Court in *Patto Kumari* v. *Upendra Nath Ghosh*[10], if the parties had gone on with the arbitration even after the expiry of time, it is difficult to see why they should not be taken to have waived the limit as to

2. (1868) 3 Q.B. Cases 404.
3. (1884) 13 Q B.D 688.
4. (1900) 2 Q.B D. 253.
5. (1919) I.L.R. 46 Cal. 1059.
6. (1930) I.L.R. 55 Bom. 452.
7. (1911) I.L.R. 38 Cal. 522.
8. (1920) I.L.R. 45 Bom. 1071.
9. (1914) 18 C.W.N. 1325
10. (1919) 4 Pat. L.J. 265.

time and estopped by their conduct from questioning the award under para. 15, under which it was only voidable and not void as under the old Code. In this connection, resort may also be had to the powers which the Court possesses under S. 148 of the Civil Procedure Code for extending time.

———

AMRITA LAL OJHA *v.* UTTAM LAL SARKAR, I.L.R. (1938) 2 Cal. 559.

This decision brings out clearly one of the essentials of the plea of eviction by title paramount in a suit by the landlord. To constitute a good defence, the eviction must have been from something actually forming part of the premises demised; and the party evicting must have a good title and the tenant must have quitted against his will. The eviction referred to above need not necessarily be actual and it will suffice if upon a claim being made by a person with title paramount, the tenant consents by an attornment to such person to change title under which he holds or enters into a new arrangement for holding under him, as this will amount to an eviction and a fresh taking. The decision under notice emphasises that a mere suit by the paramount title-holder claiming eviction of the tenant will not by itself suffice, as it merely amounts to a threat of eviction and not an eviction. In coming to this conclusion the learned judges have differed from the prior decision of the Calcutta High Court in *Ram Chandra Chatterjee* v. *Pramatha Nath Chatterjee*[1]. The English cases relied on in the latter case were distinguished by the learned judges in this case. They were really not cases of eviction by title paramount but were suits by the landlord against his own tenant by reason of a forfeiture of the tenancy and therefore have no bearing on the question under consideration. On the other hand there are direct decisions on this point in *Devalraju* v. *Mahamed Jaffer Saheb*[2] and *Bhagavatulla Krishna Rao* v. *Mungara Sanyasi*[3], which are not noticed by the learned judges in this case which fully support the conclusion and reasoning of the learned judges. Those were cases where the paramount title holder brought suits against the tenant and his landlord, and

1. (1921) 35 C.L.J. 146: A.I.R. 1922 Cal. 237.
2. (1911) I.L.R. 36 Mad. 53.
3. (1931) 62 M.L.J. 313: I.L.R. 55 Mad. 601.

succeeded in those suits and still it was held it would not by itself operate to give rise to a valid defence of eviction by title paramount in a suit by the landlord against his tenant. The decision in *Ram Chandra Chatterjee* v. *Pramatha Nath Chatterjee*[4], referred to above was referred to and doubted in *Bhagavatula Krishna Rao* v. *Mungara Sanyasi*[5]. It must be noticed that on similar facts in *Bala Kushaba* v. *Abai Amrita Vaghmode*[6], the Bombay High Court held the tenant could set up a plea of eviction by title paramount. This decision has been supported on other grounds in *Bhagavatulla Krishna Rao* v. *Mungara Sanyasi*[5]. It is needless to add as pointed out in *Vayyaprath Kunnath Valia Muhammad* v. *Chowkkaran Orakkatteri Savakutti Koyi*[7], that an attornment alone to the paramount title-holder will not suffice in the absence of a threat of eviction by him.

---

4. (1921) 35 C.L.J. 146: A.I.R. 1922 Cal. 237.
5. (1931) 62 M.L.J. 313: I.L.R. 55 Mad. 601.
6. (1909) 11 Bom.L.R. 1093. 7. (1933) 66 M.L.J. 355,

SHANKAR LAL *v.* RANA LAL, I.L.R. (1938) All. 363 (F.B.).

This decision of the Full Bench requires reconsideration in the light of the observations of the Privy Council in *Maqbul Ahmad* v. *Pratap Narain Singh*[1], to which we find no reference is made in the present judgment. The validity of an acknowledgment of liability under S. 19 of the Limitation Act was the question in issue and the Full Bench decision is that it was invalid. The promissory note sued on was executed on 29th July, 1927 and the present suit on it was instituted on 3rd January, 1933. An acknowledgment made by a Collector when the estate of the executant was under Court of Wards, on 13th October, 1930, was relied on as saving the bar of limitation. The period from 3rd August, 1929, to 4th December, 1931, was admittedly to be excluded in computing the period of limitation under S. 52 of the Court of Wards Act (United Provinces Act IV of 1872). Under S. 19 the acknowledgment must be made "before the expiration of the period prescribed". The Full Bench holds that this acknowledgment was not so made within three years from 29th July, 1927, but it was made only during the "excluded period" which according to the learned Judges is not the period prescribed. This view seems to be opposed to the observations of the Board in *Maqbul Ahmad* v. *Pratap Narain Singh*[1]. There their Lordships observe that the expiration of the prescribed period is ascertained by the process of adding the period that ought to be excluded by the special provisions to the period primarily prescribed (that is by the Act or the schedule). The period of limitation in the above case will expire only after the expiry of three years *plus* the period of two years, four months and 20 days being the period to be excluded. As the acknowledgment was certainly *before* the expiry of the said period so calculated, the suit was well within time in this view. The High Courts of Bombay and Madras have taken the above view and though the Bombay decision may be distinguished by reason of the existence of prior acknowledgments, the Madras decision is a direct authority. The attention of the learned Judges does not seem to have been directed to the above two decisions either *Dunichand Bishandas* v. *Comptoir National D'Escompte D'Paris*[2] and *Sambayya* v. *Pedda Subbayya*[3]. In

---

1. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 (P.C.).
2. A.I.R. 1930 Bom. 187.   3. (1937) 2 M.L.J. 703.

the Bombay decision the period that was to be excluded was under S. 14 of the Limitation Act itself whereas it may be noted that in the Madras case the exclusion was by the provisions of S. 78 (2) of the Provincial Insolvency Act. The exemption under S. 52 of the U. P. Court of Wards Act is analogous to the above and to the provisions of S. 55(4) of the Madras Court of Wards Act. So far as the Madras case is concerned it may be useful to add that the pronote in question must have been kept alive by a prior acknowledgment, down to the date of adjudication, as otherwise even the subsequent acknowledgment relied on during the pendency of the insolvency proceedings after the said adjudication would have been of no avail to save the claim from the bar of limitation. The decisions relating to the invalidity of an acknowledgment made during the period when the Court is closed, in cases after the prescribed period has expired, notwithstanding S. 4 of the Limitation Act, have really no bearing on the present question in controversy, when it is remembered, as observed by the Privy Council, "that there is a marked distinction in form between S. 4 and S. 14" and "that there is nothing in S. 4 which alters the length of the prescribed period".

THE SECRETARY OF STATE *v.* THE BANK OF INDIA, LTD., (1938) 2 M.L.J. 169: L.R. 65 I.A. 286: I.L.R. (1938) Bom. 502 (P.C.). [On appeal from I.L.R. (1937) Bom. 145.]

As observed by their Lordships an important question of principle was involved in this case and their Lordships' judgment is more noteworthy for the reason that they differ from the views of the two Courts below, both on the general principles of the common law relating to the right to an indemnity, as well as on the construction of S. 21 of the Indian Securities Act, 1920. The question that fell to be decided was whether the holder of a Government security who presented it to the public debt office for renewal and obtained a new Government bond is bound to indemnify the Government when it turned out later that the holder had no title to the old bond presented for renewal owing to the signature of a prior owner of the same being found to be a forged one. The Government had to reimburse the true owner in a suit by him and they brought the present suit on the indemnity implied in the circumstances of

the case. The Government had not elected to ask for an indemnity under S. 21 of the Act. Their Lordships hold that the right under S. 21 is only an additional statutory right and does not displace the common law rule as to a right of indemnity. This is a new section inserted in the Act of 1920. It is worded in positive language empowering the Government to call for the prescribed indemnity but it does not have the negative effect of taking away the implied right of indemnity existing under the Common Law. According to their Lordships, it only gives an added statutory right different from and not inconsistent with the common law right. Of course if an express indemnity is exacted under S. 21, the implied indemnity under the common law rule will not be available. As regards the common law rule itself their Lordships point out that the principle thereof was well stated in *Sheffield Corporation* v. *Barclay*[1], and that the said principle is of the widest application. "The rule itself is not based on the fiction of contract implied by law. It is merely that there is a right of indemnity whenever one person does an act at the request of another which is not manifestly tortious to his knowledge of the person doing it *and* such act turns out to be injurious to the rights of a third party. This right will equally arise even if the person does a statutory duty, provided he does it at the request of another but if the act is done by an officer though moved to do so by another not merely on the applicant's request but in exercise of a judicial or quasi-judicial decision arrived at by him in exercise of a statutory duty imposed on him by the terms of the relevant statute to come to such a decision, either to exercise or not to exercise his powers, the implied right of indemnity does not exist. Whether a particular act comes in the one class or another will of course depend on the nature of the act and the terms of the particular statute. The mere presence of an element of choice or deliberation on the part of the officer does not take away the right of indemnity so long as he proceeds to act at the request of the applicant." Their Lordships hold that in the matter of obtaining a renewal of a Government bond under S. 12 of the Securities Act, 1920, the officer acts at the request of the applicant only and is entitled to an indemnity in proper cases.

---

1. (1905) A.C. 392.

It may be useful to add that this judgment does not deal or indicate what rights the Bank will have in their turn and against what parties. They will have their rights against Acharya from whom they purchased the note on the forged endorsement. In this case there does not seem to have been any intermediate endorsements from Acharya onwards till the note came to the Bank. In cases where an earlier endorsement is forged and there are later endorsements by various persons the rights of parties will have to be regulated in the light of S. 8 of Securities Act, which overrides the normal provisions of the Negotiable Instruments Act.

Further Government's liability in respect of old bonds renewed is only for a period of six years from the date of the issue of the renewed security. Persons who deal in the renewed security are however quite safe as the renewed note constitutes a new contract between the Government and the person to whom it is issued and all persons deriving title thereafter from him. See also *Mascarenhas* v. *Mercantile Bank of India, Ltd.*[1]

---

1. (1931) 61 M.L.J. 837: L.R. 58 I.A. 433: I.L.R. 56 Bom. 1 (P.C.).

GOPAL SATTU TIPPE *v.* DNYANU MARUTI KHADE, I.L.R. (1938) Bom. 649.

This judgment holds that the prior decision of the Bombay Court in *Basappa Budappa* v. *Bhimangowda Shiddangowda*[1], has been overruled by the decision of the Privy Council reported in *Parmeshwari Din* v. *Ram Charan*[2] affirming the judgment of the Allahabad Court in *Ram Charan* v. *Parmeshwari Din*[3]. A purchaser of properties *pendente lite* from a defendant is his 'representative' within the meaning of S. 47, Civil Procedure Code, inasmuch as the doctrine of *lis pendens* will govern his rights. A decree for possession against the defendant in the action can therefore be *executed* against such a purchaser even if he is in possession, as the decree-holder's rights are not to be affected by the transfer *pendente lite*. The Privy Council held in the case mentioned above that the dispute related to the execution of the decree and is one between the decree-holder and the judgment-debtor's representative and under S. 47, Civil Procedure Code, the executing Court has jurisdiction to decide that dispute. If so a separate suit is also barred and the present judgment follows it up by deciding that a separate suit (which would not lie) cannot be converted even into an application under S. 47, where more than three years had elapsed from the time when the right to apply for execution had accrued and the execution of the decree was consequently barred by limitation. To a similar effect there is a decision of the Madras High Court also. See *Lakshminarayana* v. *Hanumayya*[4].

GANGADHAR GOPALRAO DESHPANDE *v.* SHRIPAD ANNARAO DESHPANDE, I.L.R. (1938) Bom. 655 (F.B.).

The Bombay High Court has by its judgment in the above Full Bench case overruled its decision in *Atmaram Bhaskar* v. *Parashram Ballal*[5] and all the High Courts are now in agreement with the view that the subsequent suit for future mesne profits even though asked for and not granted by the Court in an earlier suit, is not precluded by explanation V to S. 11, Civil Procedure Code. The 'relief' referred to in the said

1. (1927) I.L.R. 52 Bom. 208. 2. (1937) 2 M.L.J. 359 at 361 (P.C.).
3. (1932) I.L.R 55 All. 235. 4. A.I.R. 1937 Mad. 580.
5. (1920) I.L.R. 45 Bom. 954.

explanation is only with reference to an accrued cause of action which is the basis of the suit and not with reference to future causes of action not yet arisen at the date of suit though the Court is specially empowered to award such a relief also in its discretion. This has been hitherto the prevalent view of all the Courts except Bombay and the Bombay Court also has now fallen into line and there is no longer any conflict of authority. It should however not be forgotten that a subsequent suit for mesne profits, where it is allowed, can only be for three years profits prior to the date of suit under Art. 109 of the Limitation Act. The parties should therefore be careful to obtain an order for future mesne profits under O. 20, r. 12 in the first suit itself inasmuch as (1) no court-fee need be paid before execution and (2) the mesne profits for the entire period from date of suit can be obtained a factor which is very important having regard to the length of the period of litigation in Indian Courts from start to finish.

NIRUPAMA DEBI *v.* ANATH BANDHU SHAHA, I.L.R. (1938) 2 Cal. 590.

This decision relates to an important question of contribution between the owners of different items of mortgaged properties under S. 82 of the Transfer of Property Act. Stripped of unnecessary details, the essential facts were as follows: Three properties were mortgaged to secure one debt. The mortgagor sold the third item of property and directed the vendee out of the price to pay off the mortgage amount in its entirety. Then he sold the second item freed from the mortgage and the sale deed recited that the vendee of the third item would pay off the whole mortgage amount. The question was whether the vendee of the second item was bound to contribute towards the mortgage amount rateably to the value of the property purchased by him and the learned Judges have answered it in the negative.

The answer to the question depends on the correct interpretation of S. 82 of the Transfer of Property Act. If attention is confined to the terms of the section alone, much of the confusion that resulted from the decisions may, we venture to submit, be avoided. Under the section, in the absence of a contract to the contrary, the several properties are liable rateably according to their values to bear the burden of the common mortgage debt. As the question of contribution arises only after the mortgagee has been satisfied and the mortgagee is not bound to apportion his claim in any manner against the properties but can recover it out of any one or many of the mortgaged properties, it would naturally follow that the contract to the contrary referred to in the section would include a contract between the owners of the various properties liable for the common mortgage debt. Overlooking this consideration it was laid down in *Ramabhadrachar* v. *Srinivasa Aiyangar*[1], relying apparently on a passage in Fisher on Mortgages which was referred to in the arguments in that case, that the contract to the contrary could not refer to one between the owners of the several mortgaged properties but could only relate to a contract between the mortgagee on the one hand and the mortgagor or mortgagors on the other. That, on this question, the section is the sole guide has been emphasised by their Lordships

1. (1900) I.L.R. 24 Mad. 85.

of the Privy Council in *Ganeshi Lal* v. *Charan Singh*[1]. When once this interpretation was placed on the section by *Ramabhadrachar* v. *Srinivasa Aiyangar*[2], it was followed in a number of decisions of the various High Courts and passed into text books of authority. *See* Sir Dinshaw Mulla's Commentaries on the Transfer of Property Act, Second Edition, page 497, where the decisions are found collected.

The question was however fully discussed by Mr. Justice Venkatasubba Rao in *Muthiah Bhagavathar* v. *Venkatrama Aiyar*[3], and the learned Judge pointed out that the contract to the contrary under S. 82 need not be restricted to a contract between the mortgagee on the one hand and the mortgagor on the other, but could refer also to the contracts between the owners of the mortgaged properties whether at the time of the mortgage or later, which might vary the rule of contribution laid down by the section. The learned Judge dissented from the view held in *Ramabhadrachar* v. *Srinivasa Aiyangar*[2] and his view has since been followed in all the High Courts. See *Bava Sahib* v. *Krishna Boyan*[4], *Muthuswami Pillai* v. *Arasayee Ammal*[5], *Isri Prasad Singh* v. *Jagat Prasad Singh*[6] and *Khudawand Karim* v. *Narendra Nath*[7]. The decision of the Calcutta High Court now under notice proceeds on a similar view though the learned Judges do not say so in terms.

Their Lordships of the Privy Council however in *Ganeshi Lal* v. *Charan Singh*[1] pointed out that the contract to the contrary would be binding on the parties to the contract and the benefit of the contract should be assigned to the purchasers of the mortgaged properties if they should claim to enforce the contract and on this ground their Lordships distinguished the case in *Muhammad Abbas* v. *Muhammad Hamid*[8]. This assignment of the benefit of the contract need not necessarily be express and it can be inferred from the fact that the other items of the mortgaged properties are transferred to the purchaser freed from the liability under the mortgage. This is the nature of

1. (1930) 59 M.L.J. 177: L.R. 57 I.A. 189: I.L.R. 52 All. 358 (P.C.).
2. (1900) I.L.R. 24 Mad. 85.
3. (1935) 69 M.L.J. 303: I.L.R. 59 Mad. 121.
4. A.I.R. 1936 Mad. 898.
5. A.I.R. 1936 Mad. 901: 44 L.W. 447.
6. (1937) I.L.R. 16 Pat. 557: A.I.R. 1937 Pat. 628.
7. (1935) I.L.R. 58 All. 548: A.I.R. 1936 All. 258.
8. (1912) 9 All. L.J. 499.

the subsequent sale in this case and consequently the purchaser was not bound to contribute to any extent to the owner of the other property who agreed to satisfy the mortgage. This decision of the learned Judges is supported by the reasoning and the decisions in *Bava Sahib* v. *Krishna Boyan*[1] and *Muthuswami Pillai* v. *Arasayee Ammal*[2] which are decisions on similar facts.

RADHA KISSEN *v.* HIRA LAL BANJARA, I.L.R. (1938) 2 Cal. 618.

In this case, the Presidency Small Causes Court of Calcutta sold certain patent rights in execution without having duly attached the same previously. The question was whether the execution sale was void, because under the rules applicable to the Calcutta Small Causes Court, the words "or by sale without attachment" were omitted in S. 51 of the Civil Procedure Code; and the learned Judge regretfully held that the execution sale was void and without jurisdiction. With all respect to the learned Judge, we venture to think that this decision is open to question.

The effect of an attachment as pointed out in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[3], *Sheodhyan* v. *Bholanath*[4] and *Subramania Aiyar* v. *Krishna Aiyar*[5] is only to make the property available to the decree-holder by rendering any subsequent private transfer invalid against claims enforceable under the attachment. It is not a necessary pre-requisite to an execution sale. It has consequently been the view of all the High Courts under the old Code before the enactment of S. 51 of the new Code and since its enactment that an execution sale of immovable properties without a pre-existing attachment is only irregular and not void or illegal. See *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*[6], *Nareshchandra Mitra* v. *Molla Ataul Huq*[7], *Sheodhyan* v. *Bholanath*[4], *Subramania Aiyar* v. *Krishna Aiyar*[5], *Raja Wasir Narain Singh* v. *Bhikhari Ram*[8], and *Sakharlal Jamnadas* v. *Jerbai Sorabji*[9]. The prior decisions of the Bombay and

1. A.I.R. 1936 Mad. 898.
2. A.I.R. 1936 Mad. 901: 44 L.W. 447.
3. (1867) 8 W.R. 9.
4. (1899) I.L.R. 21 All. 311.
5. (1925) 51 M.L.J. 172.
6. (1890) I.L.R. 18 Cal. 188.
7. (1929) I.L.R. 57 Cal. 1206.
8. (1922) I.L.R. 2 Pat. 207.
9. (1934) I.L.R. 58 Bom. 564.

Calcutta High Courts in *Sorabji Coovarji* v. *Kala Raghunath*[1] and *Panchanan Das* v. *Kunja Behari*[2] which held that an attachment is a necessary pre-requisite for sale have since been dissented from in the later decisions of those High Courts in *Sakharlal Jamnadas* v. *Jerbai Sorabji*[3] and *Nareshchandra Mitra* v. *Molla Ataul Huq*[4]. The absence of attachment has been held in the above cases only to amount to a material irregularity in the publication or conduct of the sale which would entitle the judgment-debtor and others interested in the property to set aside the sale under O. 21, r. 90 of the Code; if thereby a substantial injury had been caused.

The case of a movable property under which class a patent right would fall would seem to be an *a fortiori* case, because under O. 21, r. 77 (2) the sale became absolute on the payment of the price and under O. 21, r. 78 of the Civil Procedure Code, no irregularity in publishing or conducting a sale of movable property would vitiate the sale and the person sustaining any injury by reason of such irregularity would only be entitled to compensation and if the person who caused the injury was the purchaser, to recover the property from him. It must be observed that in this case, there was not even a suggestion that by reason of the absence of attachment the judgment-debtor sustained any loss in the execution sale. We therefore submit there was no room for the regret by the learned Judge and he could well have held following his natural inclination as to the justice of the case, that the execution sale was valid and conveyed a good title to the purchaser.

---

1. (1911) I.L.R. 36 Bom. 156.
2. (1917) 42 I.C. 259.
3. (1934) I.L.R. 58 Bom. 564.
4. (1929) I.L.R. 57 Cal. 1206.

HARE KRISHNA MAITI *v.* GAJENDRA NATH HATOI, I.L.R. (1938) 2 Cal. 643.

One of the questions in this case was whether a purchaser in execution in a first mortgagee's suit to which the puisne mortgagee is not made a party is bound to account for the profits received by him from the property in a subsequent suit for redemption by the puisne mortgagee and the learned judge has held following *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra*[1], that he was so bound. It is clear that in such a suit, the amount due to the prior mortgagee is calculated on the basis that the first defective suit on the prior mortgage was not brought at all and that therefore the amount is calculated on the footing of the first mortgage bond itself till the date fixed for payment in the second suit. *Matru Lal* v. *Durga Kunwar*[2], and *Umes Chunder Sircar* v. *Zahur Fatima*[3].

Then the further question is whether the purchaser in the first mortgagee's suit should account for the profits received by him from the property. The answer to this question depends on the nature of the right acquired by him in the Court auction purchase. It has been pointed out in *Chinnu Pillai* v. *Venkatasamy Chettiar*[4], that such a purchaser acquires the rights of the prior mortgagee and of the owner of the equity of redemption and that his position is similar to that of a purchaser in a voluntary sale of the prior mortgage right and the equity of redemption. It has been held that if a purchaser of the equity of redemption in a private sale pays off the first mortgage when a puisne mortgage is outstanding, he can appropriate the rents and profits from the property as representing the ownership of the equity of redemption and also claim the entire interest on the basis of the first mortgage, as against the puisne mortgagee. *Malireddi Ayyareddi* v. *Gopalakrishnayya*[5], affirmed by the Privy Council in *Malireddi Ayyareddi* v. *Gopalakrishnayya*[6], *Pichai Konar* v. *Narasimha Rama Aiyar*[7]. See however *Ramachandra Naidu* v. *Pavalayammal*[8]. This would logically seem to be the result

1. (1922) I.L R. 49 Cal. 626.
2. (1920) 38 M.L.J. 419: L.R. 47 I.A. 71: I.L.R. 42 All. 364 (P.C.).
3. (1890) L.R. 17 I.A. 201: I.L.R. 18 Cal, 164 (P.C.).
4. (1915) 30 M.L.J. 347: I.L.R. 40 Mad. 77.
5. (1920) 12 L.W. 101.
6. (1923) 46 M.L.J. 164: L.R. 51 I.A. 140: I.L.R. 47 Mad. 190 (P.C.).
7. (1929) 58 M.L.J. 343. 8. (1934) 68 M.L.J. 717.

even if there is a gift of the equity of redemption and not a purchase for value. It has however been said in *Natesan Chettiar* v. *Ramalinga Chettiar*[1], that as against the puisne mortgagee who was not impleaded in the prior mortgagee's suit, the purchaser in execution of the decree in the suit would not get the equity of redemption, and that the sale of equity of redemption is void and is a nullity. It is difficult to reconcile this view with the decision in *Chinnu Pillai* v. *Venkatasamy Chettiar*[2] referred to above. If the sale of the equity of redemption is a nullity, it would raise the question in whom it still vests. If it continues to vest in the original mortgagor he would seem to be the person entitled to the rents and profits and the puisne mortgagee would not be entitled to the same as he would not be entitled to possession. If again the sale of the equity of redemption is void against the puisne mortgagee who was not impleaded in the prior suit, could the puisne mortgagee still sue the original mortgagor as continuing to be the owner of the equity of redemption without impleading the execution purchaser. These considerations would seem to point to the conclusion that as against the puisne mortgagee the execution purchaser would be the owner of the equity of redemption. If so, it is difficult to see why he should not enjoy the rents and profits in his own right as the owner of the equity of redemption just like the mortgagor himself and should account for the same to the puisne mortgagee. It has however been held in *Muthammal* v. *Rasu Pillai*[3], after a review of the prior decisions that an execution purchaser in a defective prior mortgagee's suit is bound to account for the profits received on the footing that they were payments made by the mortgagor towards his mortgage which so far as the puisne mortgagee is concerned must be deemed to be outstanding. There is a further distinction made in such cases that if in the execution sale he pays more for the property than would satisfy the first mortgage, he should only account for the proportion of the profits referable to such excess over the mortgage amount. See *Muthammal* v. *Rasu Pillai*[3]. This distinction has not been approved of in the latest Madras case of *Natesan Chettiar* v. *Ramalinga Chettiar*[1], where it has been held that in all cases, the execution purchaser in the defective

---

1. (1937) 46 L.W. 332.
2. (1915) 30 M.L.J. 347: I.L.R. 40 Mad. 77.
3. (1917) I.L.R. 41 Mad. 513 at 517.

prior mortgagee's suit should account for the entirety of rents and profits from the property following *Ramji Lal* v. *Roshan Singh*[1] and *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra*[2]. The case under notice does not note the distinction referred to above and it is not clear from the facts whether the purchase money was more than sufficient to meet the prior mortgage. With regard to *Ramachandra Naidu* v. *Pavalayammal*[3], referred to above, it is difficult to rest the decision on any intelligible legal footing. From all that has been stated above, it would seem that the question requires fuller consideration in all its aspects in a later case.

SHETH MANEKLAL KALIDAS *v.* LUVAR SHIVLAL DAYARAM, I.L.R. (1939) Bom. 9.

One of the questions in this case was whether the time taken by a prior suit or proceeding which was dismissed as being premature can be availed of for saving limitation for a subsequent suit after the accrual of the cause of action, under S. 14 of the Indian Limitation Act and the learned judges have answered it in the affirmative. In coming to this conclusion, the learned judges have relied on the decision of the Privy Council in *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri*[4]. The argument against the conclusion of the learned judges was that when the previous suit was held to be premature, the basis of the prior decision was that the plaintiff had no cause of action for his prior suit and it could not therefore be said that there was a cause of action for the prior suit and that it was the same as the one on which the subsequent suit was brought as required by S. 14 of the Indian Limitation Act. A further argument was that the dismissal of the prior suit as premature is not due to a cause of a like nature to that of defect of jurisdiction within the meaning of the section.

In the first place, it must be observed that it has been repeatedly held that S. 14 of the Limitation Act has to be con-

---

1. A.I.R. 1935 All. 692.
2. (1922) I.L.R. 49 Cal. 626.
3. (1934) 68 M.L.J. 717.
4. (1903) L.R. 30 I.A. 177: I.L.R. 30 Cal. 1033 (P.C.).

strued liberally. *Kunhi Kutti Ali* v. *Kunhammadi*[1], *Shri Sharada Peeth Math* v. *Shri Rajrajeshwarashram*[2] and *Tirumala Narasimhacharyulu* v. *Sobhnadri Appa Rao*[3], though it should not involve a disregard of the words of the enactment.

The decision of their Lordships of the Privy Council in *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri*[4], seems to be based on similar facts; but neither in the arguments as reported in the Indian Law Reports nor the Indian Appeals nor in the judgment is any reference made to the provisions of S. 14 of the Limitation Act. That is perhaps the reason why this decision is not noticed under the section by Mitra or Rustomji in their works on Limitation as an authority under the section. This decision of the Privy Council has however been rested on S. 14 in *Saraj Ranjan Choudhry* v. *Premchand Choudhry*[5] and *Ram Charan Sahu* v. *Mata Prasad*[6], as noticed by Mr. Rustomji at page 967 of the fifth edition of his book. The learned author however observed at page 248 that the failure of the prior suit by reason of its prematureness is not a cause of a like nature to defect of jurisdiction within the meaning of S. 14 and the learned author is supported in this view by the decision of the Calcutta High Court in *Dwarkanath Chakravarti* v. *Atul Chandra Chakravarti*[7], though there is no discussion of the point. We venture to submit that the view of the learned judges in the case under notice is to be preferred as it takes a more liberal view of the terms of the section and is supported by the decision of the Privy Council referred to above.

---

1. (1922) 44 M.L.J. 179.
2. A.I.R. 1933 Bom. 276 : 35 Bom. L.R. 440.
3. (1932) 140 I.C. 270 at 272.
4. (1903) L.R. 30 I.A. 177 : I.L.R. 30 Cal. 1033 (P.C.).
5. (1917) 22 C.W.N. 263.
6. (1927) I.L.R. 49 All. 565.
7. (1919) I.L.R. 46 Cal. 870.

BHARAT ABHYUDOY COTTON MILLS, LIMITED *v.* MAHARAJA OF DHARBHANGA, I.L.R. (1939) 1 Cal. 81.

We are not sure whether the learned judges have not placed an unduly narrow construction on the explanation to O. 33, r. 1 of the Civil Procedure Code in holding that a corporation cannot sue *in forma pauperis* and that it is not a "person" within the meaning of the rule. In coming to this conclusion they have placed strong reliance on the personal attributes referred to in the rules of O. 33, such as the reference to the wearing apparel of the petitioner in r. 1, the presentation of the petition in person in r. 3 and the reference to the examination of the applicant by the Court in r. 4 and hold that as these attributes cannot exist in the case of a corporation, it is outside the scope of O. 33.

In laying emphasis on these attributes, we shall be excluding not merely corporations but also infants, persons of unsound mind and deities who are juristic persons in law. We are not clear whether the learned judges intended to lay down that these are also excluded from the privilege of suing as paupers. We find that the cases relating to *Thakurs* were referred to in the argument, but the learned judges do not express any opinion on them. It is well settled by the decisions of all the High Courts that infants can sue as paupers under O. 33 of the Civil Procedure Code. (See *Venkatanarasayya* v. *Achemma*[1], *Nemichand Bhickchand Marwadi* v. *Kevalchand Jasraj Marwadi*[2], *Nanibala Dassya* v. *Jaimini Sundari*[3] and *Sharan Singh* v. *Mt. Man Kaur*[4].

Similarly, in the cases of Hindu deities and wakfs, it has been held that a suit can be filed *in forma pauperis* and that in this connection, the means of the mutwalli or the shebait is immaterial. *Sm. Mabia Khatun* v. *Sheikh Satkari*[5], *Kunja Behari* v. *Mohit Singh*[6] and *Nanda Lal Chatterjee* v. *Dwarka Nath Das*[7]. It cannot be suggested that a next friend can present the application on behalf of the minor under the provisions of O. 32, r. 5, because O. 33, r. 3 enacts that notwithstanding anything contained in the rules the application should be presented in person by the applicant and a baby in arms and

1. (1881) I.L.R. 3 Mad. 3.
2. A.I.R. 1924 Bom. 440: 26 Bom.L.R. 380.
3. A.I.R. 1923 Cal. 656.
4. A.I.R. 1929 Lah. 746.
5. A.I.R. 1927 Cal. 309.
6. A.I.R. 1934 Pat. 531.
7. (1911) 16 C.W.N. 93: 11 I.C. 892.

a lunatic cannot present the petition in person; nor can they be examined by the Court under O. 33, r. 4. These considerations would seem to indicate that the personal attributes have been unduly emphasised in arriving at the conclusion as to the meaning of the word "person" in O. 33, r. 1. They can only therefore refer to the cases where those personal attributes can exist and the rules should be understood as providing that in those cases they should be observed. In fact even in the English cases, it has been pointed out as in *Hirst* v. *West Riding Union Banking Company*[1], that though the personal attribute of signature referred to by the statute can have no application to a corporation, a corporation was nevertheless within the intendment of the statute. Indeed, Stirling, L.J., in the Court of Appeal points out that if too much stress is laid on the signature of the person, a person who by reason of disease cannot sign, would be outside the protection of the statute. Also see *Cortis* v. *Kent Water-works Company*[2].

There are numerous cases in England on the question whether in any statute the word "person" excludes a corporation or not. They will be found collected in Stroud's Judicial Dictionary and its supplement under the heading "person" and also in Halsbury's Laws of England in the volume dealing with Statutes and also in the Empire Digest under the heading Corporation. The decision under any one statute cannot be an authority under another statute and it is difficult to reconcile all the decisions. The discussion in all the cases has been whether by reason of the context, the manifest object of the statute or the nature of the subject-matter, a corporation should be excluded from the signification of the term "person". This is the test laid down by Lord Selborne in *The Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited*[3] and by Lord Blackburn at page 869. It is of interest to note that Lord Blackburn whose judgment in the above case has been strongly relied on by the learned judges in the case under notice, himself held that though a corporation may not be a "person" within the meaning of Ss. 1 and 15 of the Act there considered, it would

1. (1901) 2 K.B. 560.
2. (1827) 7 B. & C. 314: 108 E.R. 741.
3. (1880) 5 A.C. 857 at 862.

be a "person" within the meaning of S. 17 of that Act. *Vide* pages 872 and 873.

We should therefore consider whether there is anything in the object of the Civil Procedure Code, or its subject-matter to show that a juristic person like a corporation should be excluded from the benefit of the procedure of suing as a pauper. Put in this form, the question can admit of only one answer and that in the negative. If so, we venture to submit that a corporation can sue as a pauper and the reference to the personal presentation, wearing apparel, etc., can only have reference to the cases where they can exist. The correct meaning of the word "person" in r. (1) was given by Venkataramana Rao, J., in delivering the judgment of the Full Bench in *Swaminathan* v. *Official Receiver of Ramnad*[1].

GOKAL CHAND-JAGAN NATH (FIRM) *v.* NAND RAM DAS-ATMA RAM (FIRM), (1939) 1 M.L.J. 56: L.R. 66 I.A. 13: I.L.R. 1939 Lah. 56 (P.C.).

The question in this case is one of general interest in the law of agency and as such it has found its way into the English Law Reports as well and reported in (1939) A.C. 106. A commission agent collected from a customer who was financially embarrassed at the time, only a portion of his dues in cash and for the balance, he gave credit having taken hundies. The customer subsequently became insolvent. The principal sued the agent for the balance and contended that the agent had no authority to receive anything but cash and was therefore liable for the amount for which he gave credit. Their Lordships point out that though the general rule is that an agent has no authority to receive payment otherwise than in cash, it has no application to a case when the customer is financially embarrassed and the result of pressing him to pay the whole amount without giving him credit will only be to drive him to insolvency. There is no case directly bearing on the question; but their Lordships have invoked the analogy of the decision in *Russell* v. *Palmer*[2]. In such a case, their Lordships have pointed out that it is the duty of the principal to show that more could have been recovered and that the agent was negligent in not doing so.

---

1. (1937) 1 M.L.J. 727: I.L.R. 1937 Mad. 784 (F.B.).
2. (1767) 2 Wils. K. B. 325: 95 E.R. 837.

On the other point, to the effect of the appellate judgment not complying with the requirements of O. 41, r. 31 of the Civil Procedure Code, there is a conflict of decisions in the High Courts in India. Some of the decisions hold that the appellate decision should be set aside on that ground and while others hold that it is only an irregularity within the terms of S. 99 of the Civil Procedure Code. The former class of cases may be illustrated by *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*[1], *Saravana Pillai* v. *Sesha Reddi*[2], *Sri Ranganatha Thathachariar* v. *Veeravalli Rajagopalachariar*[3], *Ganapathi Ranu* v. *Sewakram*[4] and *Harnama* v. *Ghania Lal*[5], while in *Mygapula Ganganna* v. *Sri Rajah Uppalapati Venkata Vijaya Gopalaraju Garu Bafhiyat Bashand*[6] and *Bisvanath Maiti* v. *Baidyanath Manduh*[7], it was held that the non-compliance with the terms of O. 41, r. 31 is only an irregularity. It is a question whether this decision of their Lordships has approved the latter line of cases.

[END OF VOLUME.]

---

1. (1898) 8 M.L.J. 183: I.L.R. 22 Mad. 12.
2. (1908) 18 M.L.J. 34: I.L.R. 31 Mad. 469 (F.B.).
3. A.I.R. 1928 Mad. 16.
4. (1918) 20 Bom.L.R. 461.
5. A.I.R. 1930 Lah. 152.
6. (1916) 31 M.L.J. 870.
7. (1885) I.L.R. 12 Cal. 199.